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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 76-5306

ERNEST JOHN DOBBERT, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida entered in the above styled case January 14, 1976.

REFERENCE TO OPINION BELOW

The decision of the Supreme Court of Florida affirming the judgment and sentence of the Circuit Court of the Fourth Judicial Circuit of Florida is reported at 328 So. 2d 433 (Fla., January 14, 1976), and is reprinted in Appendix A, infra.

JURISDICTION

The decision of the Supreme Court of Florida was handed down January 14, 1976. A timely Petition for Rehearing was filed, duly amended and denied April 5, 1976. A motion for extension of time to file this petition was addressed to Justice Powell June 16, 1976, and granted with leave to file by September 2, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257 (3) (1970).

QUESTIONS PRESENTED

I. WHETHER THE IMPOSITION OF THE DEATH PENALTY AS TO THIS PETITIONER, PURSUANT TO A FLORIDA STATUTE PASSED SUBSEQUENTLY TO THE DATE OF THE ALLEGED OFFENSE FOR WHICH THE PETITIONER WAS CONVICTED, WAS A VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS AND A DENIAL OF EQUAL PROTECTION OF THE LAWS.

II. WHETHER THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE PETITIONER'S TRIAL SHOWS INHERENT PREJUDICE IN THE PRE-TRIAL SETTING AND JURY SELECTION PROCESS TO THE EXTENT THAT THE PETITIONER WAS DENIED DUE PROCESS OF LAW

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., art. I, Section 10, provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin and Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

U.S. Const., amend. XIV, Section 1, provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fla.Const., art. I, Section 10, provides:

> "Prohibited laws. -- No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."

Fla.Const., art. X, Section 9, provides:

> "Repeal of criminal statutes. -- Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed."

Fla.Stat., Section 921.141 (1971) provides:

> "Recommendation to mercy. -- A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by a majority of the jury. When the verdict includes a recommendation to mercy by a majority of the jury, the court shall sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death on a plea of guilty or when a jury is waived shall be sentenced by the court to death or life imprisonment."

Fla.Stat., Section 775.082 (1971) provides:

> "Penalties for felonies and misdemeanors. -- (1) A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, and the discretion of the court."

Fla.Stat., Section 775.082 (1972 Supp.) provides:

> "Penalties for felonies and misdemeanors. -- (1) A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, in the discretion of the court.
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person who has been convicted of a capital felony shall be punished by life imprisonment.
> (3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment with no elibibility for parole."

Fla.Stat., Section 775.082 (1973) provides:

> "Penalties for felonies and misdemeanors. -- (1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedures set forth in Sections 921.141 result in findings by the court, that such person shall be punished by death, and in the latter event, such person shall be punished by death.
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).
> (3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1)."

Ch. 72-724, Laws of Florida (1972).
Fla.Stat., Section 921.141 (1973).

The pertinent verbatim texts of these provisions are set forth in Appendix B, *infra*.

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Florida filed on January 14, 1976, affirming Petitioner's conviction of first degree murder and sentence of death. Petitioner, Ernest John Dobbert, Jr., an indigent white male, was sentenced to die by the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida on April 12, 1974, following his conviction of the murder of his daughter, Kelly Ann Dobbert.

In January of 1973, an anonymous phone call notified the Division of Family Services (a subdivision of the Florida Department of Health and Rehabilitative Services) that there was evidence of child abuse at the residence of Ernest John Dobbert, Jr., in Jacksonville, Florida. A social worker from the Division of Family Services contacted a neighbor of Mr. Dobbert and made a preliminary determination that the anonymous caller had been mistaken. Before closing the case, the social worker personally contacted Mr. Dobbert and was told that the Dobbert children were in good health. The worker observed one child with Mr. Dobbert and was told by Mr. Dobbert that one other child was living with him in Jacksonville and that the other two children were in Wisconsin with Dobbert's mother. Mr. Dobbert further informed the worker that he intended to leave Jacksonville with the two children and return to his mother's home in Wisconsin. Following this meeting with Mr. Dobbert, the case was closed and filed away.

In the Spring of 1973, the Petitioner's son, Ernest John Dobbert, III, was found wandering outside a Holiday Inn in Jacksonville, Florida. Jacksonville police turned the boy over to the Division of Family Services. It was apparent that the boy had suffered injuries of one type or another to his back, his head and his feet. Upon questioning, the boy initially

indicated that he scraped his back on coral while swimming off a local beach. Following a brief confrontation with the Petitioner, the boy was taken before a local circuit judge who promptly placed the boy in the protective custody of the Division of Family Services. The boy told the judge that his injuries were a result of beatings by his father, that his brother and one of his sisters were dead as a result of beatings by his father, and that his remaining sister was at home with the father locked in a closet. The judge issued a warrant for Petitioner's arrest. Prior to service of the warrant, Petitioner left Jacksonville and proceeded to Fort Lauderdale, Florida. On April 13, 1973, Petitioner's daughter, Honore Elizabeth Dobbert, was found in a hospital in Fort Lauderdale with a note pinned to her clothing asking that she be sent to her mother in Wisconsin. The Petitioner's abandoned automobile was found under a bridge at the edge of the Intracoastal Waterway in Fort Lauderdale with a suicide note on the frontseat. The two Dobbert children were reunited under the protective custody of the Division of Family Services in Jacksonville and a search for their father, the Petitioner, began.

Press coverage began almost immediately and closely followed Petitioner's arrest in Texas and his ultimate extradition and return to Florida in October of 1973. (Appendix C, infra).

An indictment was filed December 27, 1973, charging the Petitioner with two counts of murder in the first degree and two counts of child torture. On January 15, 1973, Petitioner filed a motion requesting the trial court to enter an order specifying the manner of trial, number of trial jurors, and the penalties applicable to counts one and two of the indictment. As grounds for the motion, Petitioner stated:

> "1. The indictment herein only alleges a violation of Florida Statutes 782.04 and the undersigned attorney submits that there is presently great confusion in the law as to the manner of trial and the applicable penalties in a case where the alleged offense occurred at

> the time specified in this indictment.
>
> 2. The confusion exists as a result of the case of State v. Lee, Case No. R-452, 1st DCA Florida, November 2, 1973, question certified to Florida Supreme Court January 7, 1974.
>
> 3. Unless this court enters its pretrial order as requested, defense counsel is unable to properly advise the defendant herein and is unable to properly prepare a defense."

The first degree murder charged in count one of the indictment of December 27, 1973, alleged that the death occurred on December 31, 1971. The first degree murder charged in count two of the indictment alleged that the death occurred between the first day of January and the 8th day of April, 1972. The trial court entered an order which sets forth verbatim:

> "The within motion coming on to be heard in open Court, defendant being present and arguments presented, IT IS, THEREUPON, CONSIDERED ORDERED AND ADJUDGED that said Motion be and the same is hereby (sic) the court rules that this is a capital-death penalty with twelve man jury - - DONE AND ORDERED in open Court this 22nd day of February, A.D. 1974."

On January 30, 1974, Petitioner filed a motion for continuance. The trial court denied the motion for continuance on February 4, 1974. On February 8, 1974, the State filed an amended indictment, again charging two counts of murder in the first degree and two counts of child torture. Also on February 8, 1974, the Petitioner filed an Application for Constitutional Stay of Trial (Appendix D, infra). The application, filed pursuant to Rule 4.5(g), Florida Appellate Rules, raised the question of an ex post facto application of the new Florida death penalty sentencing statute.[1]

---

[1] Ch. 72-724 (Appendix B, infra) which went into effect December 8, 1972.

At the time of Petitioner's Application for Stay of Trial in the Florida Supreme Court, the Lee case was on petition for writ of certiorari to that court and oral arguments were pending therein.

Oral arguments were heard on Petitioner's Application for Stay of Trial on February 18, 1974, and an order denying the application was entered the same day (Appendix E, infra).

On March 7, 1974, Petitioner filed a motion and affidavit for change of venue (Appendix F, infra), pursuant to Rule 3.240, Florida Rules of Criminal Procedure, and cited as grounds, inter alia:

> "1. That Defendant stands accused of acts which are inherently odious and subject to inflammatory exploitation by the press and the electronic news media.
>
> 2. That the acts of which Defendant stands accused have in fact been widely exploited by the press and the electronic news media to the extent that Duval County, Florida, has become irreparably permeated with prejudicial publicity.
>
> 3. That the extensive publicity concerning the Defendant has included detailed accounts of the investigation of the case, a search for bodies by certain members of the Jacksonville Police Department accompanied by television news men, the flight of the Defendant, his subsequent extradition and arrest and lengthy speculation concerning the probable development of the factual and legal issues to be decided at trial.
>
> 4. That, as a result of the extensive publicity in this case, defendant has become known by name to the general populous of Duval County and Northeast Florida and that his name has come to be equated with the odious and infamous crime of child torture.
>
> 5. That the notoriety of this Defendant has been cited in the local press by an official employed by the Division of Family Services (State Department of Health and Rehabilitative Services) as a causative factor in the documented increase in reported cases of child abuse in Duval County, Florida.
>
> 6. That as a direct consequence of this extensive publicity and resulting notoriety,

> the atmosphere prevailing at this time, and likely to become exacerbated during the period immediately preceding trial, is so latent with the possibility of prejudice to this Defendant that there is reason to believe that a fair and impartial trial cannot be had in Duval County, Florida."

The supporting affidavits of three prominent Jacksonville attorneys were filed with the motion (Appendix F, infra). On March 12, 1974, following eleven months of continuous and unrelenting publicity concerning the case, the trial court entered a "gag order" forbidding the Jacksonville Sheriff's Office and all court personnel from making statements to the news media at any time before or during the trial. On March 15, 1974, an evidentiary hearing on the Petitioner's motion for change of venue was held. The Petitioner presented twelve witnesses, representatives of the news media in Jacksonville, Florida and displayed video tape and other exhibits of media coverage of the case. Following arguments of counsel, the trial court entered the following order:

> "Motion under advisement after one day of testimony & evidence, till it is determined from jury selection -- if it (sic) possible to get a fair & impartial jury."

Jury selection was scheduled for March 18, 1974. Prior to the commencement of the voir dire examination, the Petitioner objected to the method of trial selected by the trial court:

> "MR. SOUTHWOOD: Your Honor, also at this time I recall there was a motion made by the defense to -- that the court set forth the number of jurors in which (sic) this case will be tried. The court made its ruling. I did not see a written order to that effect and since I did not actually move to have it tried one way or the other, I would like to formally object at this time to the case being tried by twelve jurors and having the death penalty applicable to the first two counts.

> THE COURT: Yes, sir. All right, the court previously ruled that this was a death penalty or capital case and that the manner of trial would be by twelve man jury with the appropriate number of alternatives. All right. I deny the motion."

The voir dire examination began the morning of March 19, 1974, and continued until 10:15 A.M., Thursday, March 21, 1974, when counsel for Petitioner announced:

> "MR. SOUTHWOOD: The defense accepts the jurors tentatively. We would like to say that we do it with reservations. The defendant moved for a change of venue. It was taken under advisement and denied pending jury selection. The defendant does not waive this motion. The evidence presented in the change of venue shows the defendant would not receive a fair trial in Duval County. . . . (I)t would be unfair, and it further prejudiced the defendant's right to a fair trial if we were required to exercise all our peremptory challenges, since he must choose from a jury panel here in Duval County. Be tried from a jury panel here in Duval County. It must be clear on the record we don't waive our change of venue motion, but we will accept this jury because it is the best jury under the circumstances, but does not meet the constitutional standards for fair trial."

Eighty-eight veniremen had been interviewed. Prior to the final day of jury selection, the Petitioner had exercised twenty-four of his thirty-two peremptory challenges. There were forty-seven prospective jurors remaining for selection in the courtroom and seventy-five more available on call from the regular circuit court panel of jurors not used by other courts in session (Appendix C, infra, p. 15c).

Out of the eighty-eight examined on voir dire, only thirteen had no knowledge of the facts of the case. Of the thirteen, two were ultimately chosen to sit as jurors, seven were excused by the State, two were excused by the Petitioner, and two were excused for cause.

The trial proper began on March 25, 1974. On Friday, March 29, 1974, the jury returned verdicts of guilty of murder in the first degree as to count one of the amended indictment, guilty of murder in the second degree as to count two, guilty of child abuse (a lesser included offense) on count three, and guilty of child torture on count four.

A hearing pursuant to the new Florida death penalty sentencing provision was held the following morning. Prior to the commencement of the hearing proper, the Petitioner again objected to the application of the death penalty to this case:

> "MR. SOUTHWOOD: Judge, may I make just one note --
>
> THE COURT: Yes, sir.
>
> MR. SOUTHWOOD: -- for the purpose of the record? I would like to further object to this proceeding in that I do not feel, again, that the death penalty is applicable in this particular case or, of course, constitutional in any other crimes."

The court reiterated its earlier ruling as follows:

> "THE COURT: All right, I deny the motion, proceeding under various cases and the Rudolph Valentine Lee and other cases which I think justify the bifurcated trial."

Following the presentation of psychiatric reports and the arguments of counsel, the jury rendered an advisory sentence finding sufficient mitigating circumstances outweighing any aggravating circumstances and recommending by a ten to two majority a sentence of life imprisonment.

The Petitioner filed a timely motion for new trial on April 8, 1974. The motion for new trial was denied by the trial court on April 12, 1974. On that date the trial court overruled the advisory sentence of the jury and sentenced the Petitioner to death on count one of the amended indictment and to the

maximum prison terms on counts two through four, all sentences to be served consecutively.

The Petitioner was adjudged insolvent for purposes of appeal and a timely notice of appeal to the Florida Supreme Court was filed on April 25, 1974. The constitutional questions presented in this petition were assigned as errors on appeal, briefed and appeared before the Florida Supreme Court as follows:

> "II. THE TRIAL COURT ERRED IN FAILING TO CHANGE VENUE AND IN PROCEEDING WITH TRIAL IN JACKSONVILLE, FLORIDA.
>
> III. THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO DEATH.
>
> A. THE TRIAL COURT ERRED IN RULING THAT CAPITAL PUNISHMENT WAS APPLICABLE IN THE CASE AT BAR."

Oral arguments were heard by the Florida Supreme Court on April 3, 1975, and the court affirmed the judgment and conviction in the trial court. *Dobbert v. State*, 328 So. 2d 433 (Fla. January 14, 1976).

The Florida Supreme Court did not address the *ex post facto* question in its decision. As to the trial court's failure to grant the Petitioner's motion for a change of venue, the majority opinion, citing *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed 2d 589 (1975), held that the trial judge did not abuse his discretion in denying the motion for change of venue. *Dobbert* at 440.

There were three dissenting opinions: Justice Boyd would have reversed for the trial court's failure to charge the jury that it was authorized by law to find the Petitioner guilty of attempted murder and for the failure of the trial court to grant the Petitioner's motion for change of venue; Justices Overton and England would have reversed the trial court's decision to overrule the advisory sentence of the jury and would have required the adoption of the jury's recommendation of life imprisonment, citing *Tedder v. State*, 332 So. 2d 908 (Fla. 1975).

Petition for Rehearing was denied on April 5, 1976. Application for Stay of Execution of the death sentence in this case was granted by Justice Powell on May 3, 1976. A Motion for Extension of Time to File this Petition for Certiorari was granted by Justice Powell on June 21, 1976.

REASONS FOR GRANTING THE WRIT

I.

A. EX POST FACTO

This petition presents a significant and unique example of an ex post facto application of a state statute whereby the Petitioner was deprived of the most substantial right known to man -- the right to life itself.

The earliest and most often quoted judicial interpretation of Article I, Section 10 (3) of the United States Constitution was delivered by Justice Chase in 1798, nine years from the date of the establishment of that constitution. In Calder v. Bull, 3 U.S. 386, 3 Dall. 386 (1798), Justice Chase said:

> ". . . the plain and obvious meaning and intention of the prohibition is this: that the legislators of the several states, shall not pass laws, after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation.
>
> I will state what laws I consider ex post facto laws, within the words and intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes

> it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, then the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws are manifestly unjust and oppressive." 3 U.S. 388-390.

The decision of the Florida Supreme Court below, affirming the Petitioner's death sentence is a "category 3" violation of the ex post facto prohibition as defined by Justice Chase: it has the effect of changing the punishment and inflicts a greater punishment than the law provided for the crime when committed.

The pertinent legislative facts are as follows:

On December 31, 1971, the date of the offense for which Petitioner was sentenced to death, Fla.Stat., Section 921.141 (1971) provided:

> "A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by a majority of the jury. When the verdict includes a recommendation to mercy by a majority of the jury, the court shall sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death on a plea of guilty or when a jury is waived shall be sentenced by the court to death or life imprisonment."

On December 31, 1971, Fla.Stat., Section 775.082 (1971) provided:

> "A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A

> defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment in the discretion of the court."

On April 12, 1974, the Petitioner was sentenced to death pursuant to Fla.Stat., Section 921.141, as amended by Ch. 72-724, Laws of Florida (1972), which provided for bifurcated guilt/penalty trials at the conclusion of which the final determination of life or death was given to the trial judge, subject to review by the Florida Supreme Court (Appendix B, infra).

On April 12, 1974, Fla.Stat., Section 775.082 (1), as amended by Ch. 72-724, Laws of Florida (1972), provided:

> "(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole (unless sentenced to death)." (Emphasis added)

The sentence of April 12, 1974, overruling the jury's recommendation of life imprisonment (by a ten to two majority) constitutes an ex post facto application of a state statute because:

1. If Petitioner had been tried under the law in effect at the time the offense was committed a recommendation of mercy by a majority of the jurors would have automatically resulted in a life sentence. The jurors in Petitioner's case did vote ten to two for life. By application of Fla.Stat., Sections 775.082 (1) and 921.141 as amended, Petitioner was denied that degree of mercy afforded by the earlier version of the statute and in fact received the death penalty when he would have received life.

2. The trial court in the case sub judice was faced with a confusing array of legislative enactments and judicial interpretations of those enactments in the wake of this Court's

decision in Furman v. Georgia, 408 U.S. 238 (1972).

In anticipation of the Furman decision, the Florida legislature amended Fla.Stat., Section 775.082 (1971) to provide for automatic commutation of existing death sentences to life imprisonment with no eligibility for parole. Ch. 72-118, Laws of Florida (1972)[2], Fla.Stat., Section 775.082 (1972 Supp.).

The Florida Supreme Court in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), quickly moved to conform Florida law to Furman, invalidating the Florida death penalty provision and providing for re-sentencing under Fla.Stat., Sec. 775.082(1) (1971). Those inmates under pre-Furman sentences of death (with the exception of Rudolph Valentine Lee, see Lee v. State, 294 So. 2d 305, infra) applied to the Florida Supreme Court for commutation.

The relief was granted in Anderson v. State, 267 So. 2d 8 (1972), wherein the Florida Supreme Court vacated the sentences of all death sentences imposed before Furman and stated:

> "The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment. This is an automatic sentence and a reduction from the sentence previously imposed. The Court has no discretion." 267 So. 2d at 9.

The Court followed the Anderson decision by expediting the resentencing of the pre-Furman inmates in the case of In Re Baker, 267 So. 2d 331 (1972). The Court noted that the class of prisoners petitioning for relief wished to be resentenced prior to the effective date of Ch. 72-118, supra, in order to avoid the no parole provision of that statute. The Court granted the

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[2] Ch. 72-118 was to have become effective October 1, 1972, but was amended by Ch. 72-724 which deleted the no parole provision and substituted a twenty-five year no parole requirement for a life sentence imposed in a capital case.

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relief with an express recognition of the inherent constitutional questions raised by any retrospective application of Ch. 72-118.[3]

The validity of the amendments included within Ch. 72-724 was established in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), and upheld by this Court in *Proffitt v. Florida*, ___ U.S. ___, No. 75-5706, July 2, 1976. The new bifurcated guilt/penalty procedure should have been given prospective application to all offenses committed subsequent to December 8, 1972, the effective date of the statutes upheld by the Court. This position was urged upon the trial court and the Florida Supreme Court in Petitioner's pre-trial Application for Constitutional Stay of Trial (Appendix D, *infra*). The Petitioner requested a stay in the trial proceedings specifically alleging the *ex post facto* prohibition as a bar to the application of *Fla.Stat.*, Section 921.141 (1973), to this case.

Rejecting or disregarding Petitioner's argument, the Florida Supreme Court denied the application and the trial court proceeded in accordance with the decision of the First District Court of Appeal of Florida[4] in *State v. Lee*, 286 So. 2d 596 (1st DCA Fla. 1973), which ordered that Lee, who was sentenced to death prior to *Furman*, should be remanded for resentencing pursuant to the new Florida death penalty statute upheld in *Dixon*:

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[3] The Court was clearly concerned with the effect of any application of Ch. 72-118 to pre-*Furman* cases: "To do so (re-sentence pre-*Furman* inmates to life with no parole) would create a class statutorily denied parole . . . The uniqueness of this position would foster litigation attacking both the facial validity of the Statute (Ch. 72-118) and its selective application to an indistinguishable few . . . " 267 So. 2d at 334.

[4] Under Article V of the Florida Constitution and *Fla.Stat.*, Section 35.02 (1975), the State of Florida is divided into four appellate districts. The trial court in this case is under the direct appellate jurisdiction of the First District Court of Appeal.

> "Since during the pendency of this appeal, the statute providing for the manner in which the penalty is to be determined in capital felonies has been changed, we are bound to reverse the order setting aside appellee's death sentence and remand with directions that appellee be given a new trial on the issue of penalty only in accordance with Section 921.141, Florida Statutes, F.S.A., which has recently been upheld by our Supreme Court in *State v. Dixon*, *supra*.
>
> In reversing and remanding this case for a new penalty trial, we are not unmindful of the possible contentions that a retrial under the newly enacted death penalty statute may collide with constitutional *ex post facto* /5/ principles and, indeed, if one scratch is no deeper than the surface, it might appear that appellee is being subjected to a crime or penalty which did not exist either at the time of the murder or at the time of his trial, in violation of the *ex post facto* principle. . . . However, the newly enacted statute, Section 921.141, Florida Statutes, F.S.A., does not create a new and separate crime. Nor does it provide a new or higher penalty for first degree murder than was provided when the offense or trial herein occurred. All the new statutory provision does to attempt to provide for a manner in which the death penalty may be imposed in appropriate cases in a way that does not collide with the constitution." 286 So. 2d at 598, 599.

The decision of the trial court to follow the district court's opinion in *Lee* was not vindicated. Exactly one week from the date of the Petitioner's death sentence, the Supreme Court of Florida rendered its decision in the case of *Lee v. State*, 294 So. 2d 305 (Fla. 1974). The court specifically ruled on the *ex post facto* question as follows:

> "Under the prevailing Section 775.082, as amended by Chapter 72-724, Laws of Florida, a new provision has been added which had *not been in force and effect at the time of the commission of the offense* for which the defendant was charged, to-wit:

---

[5] *Fla.Const.*, art. I, Section 10 (p. 3, *infra*) does not substantially differ from the Federal constitutional *ex post facto* provision.

> > '(1) a person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole (unless sentenced to death.)' (Emphasis supplied)
>
> To expose this Petitioner to a greater penalty than that which originally could be imposed at the time of the commission of the offense would be an *ex post facto* implication and hence clearly unconstitutional. . . .
>
> Therefore, that portion of the penalty provision dealing with the amount of punishment is clearly a creature of statute and as such forms part of the substantive law. If the subsequent statute merely reenacted the previous penalty provision without increasing *any penalty provision which could have been imposed* under the statute in effect at the time of the commission of the offense, then there could be no application of a subsequent penalty provision which would do violence to the concept of an *ex post facto* law. Since this is not the case, that portion of the district court's opinion dealing with which law is applicable for the imposition of sentence, *Fla.Stat.*, Section 775.082, F.S.A., as amended by Chapter 72-724, must be reversed with instructions to apply the penalty provision in effect at the time of the commission of the offense."[6]

The Petitioner again raised the *ex post facto* question on appeal to the Florida Supreme Court subsequent to that court's decision in *Lee v. State*, *supra*. The decision affirming the

trial court's application of the death penalty to the Petitioner did not directly address the *ex post facto* issue and did not expressly overrule *Lee*. Reading *Lee* and *Dobbert* together it does not appear that any such result was intended.

The mandate of *Lee v. State*, *supra*, should have been applied to the Petitioner by the Florida Supreme Court. The application of the provisions of *Fla.Stat.*, Section 775.082 (1) (1973) was no less an *ex post facto* violation to Petitioner than it was to *Lee*. But the decision in *Lee* did not clearly define the process through which a new sentence could be provided.

If, as it appears from the language of the decision, the Florida Supreme Court ruled that *Lee* should be remanded for resentencing pursuant to "the penalty provision in effect at the time of the commission of the offense," 294 So. 2d at 307, *but* only following the empanelling of a new jury to make a recommendation pursuant to Ch. 72-724 (1), Laws of Florida (1972), then the court split the *ex post facto* provisions of the federal and Florida constitutions: Yes, *ex post facto* as to the added penalty of twenty-five years no parole. No, not *ex post facto*, but merely procedural, as to the manner in which life or death may be given or taken away.

By characterizing the new sentencing statute as procedural[7] the court failed to fully consider the impact of the change in the method of imposing the death penalty, and the nature of an *ex post facto* law in general.

If there was no material impairment of a substantial right of the Petitioner by operation of the new *Fla.Stat.*,

---

[6] An inexplicable series of events then followed. The *Lee* case was remanded for sentencing pursuant to the statute in effect at the time of the offense. Lee's offense, as in the case sub judice occurred prior to this Court's decision in *Furman* and the passage of Ch. 72-724 by the Florida legislature. Upon his return, the circuit court in Duval County ordered a psychiatric examination of Lee and he was subsequently sent to the Florida State Hospital in Chattahoochee. Upon his release from the Florida State Hospital, Lee was returned to the circuit court where a new jury was empanelled and evidence of aggravation and mitigation was presented pursuant to the amended Section 921.141. The jury returned an advisory sentence of death which was accepted and imposed by the trial judge. The case is now before the Florida Supreme Court on direct appeal.

[7] The court cited its constitutional power to provide for court procedure: "Since the question raised is one of the procedures to be used for the imposition of sentence, it is properly within the constitutional authority for determination by this Court. . . " 294 So. 2d 308.

Sections 775.082 (1) and 921.141, as amended, e.g.: if the statute merely changed the method of execution from hanging to electrocution, Malloy v. South Carolina, 237 U.S. 180 (1915); or if the option for severance of defendants is withdrawn and placed within the discretion of the trial judge, Beazell v. Ohio 269 U.S. 167 (1925); then the legal definition of the offense and the punishment meted out remain unchanged and there is no ex post facto application.

But in the case sub judice, the Petitioner, as sentenced pursuant to the new law, received a recommendation to life imprisonment which was converted to death by the added element of judicial discretion. Whether or not such an added element is desirable is not a question raised by this petition. The point is that this element did not exist at the time of the offense in this case and operated to convert what would have been life imprisonment in 1971 to what is now a death sentence.

This is not one of those statutory changes in the mode of trial or the rules of evidence which operate only in a limited and unsubstantial manner to Petitioner's disadvantage. See, Thompson v. Utah, 170 U.S. 348 (1898). It is an attempt to change those rules of the game which change the outcome rather than those which merely make for a more orderly contest.

3. Disregarding the actual vote of the jury and the sentence finally imposed, the Petitioner faced the added penalty of life imprisonment with no parole for twenty-five years not present in the law in effect at the time of the offense charged. The test under the ex post facto clause is not merely the actual punishment ultimately inflicted. "The ex post facto clause looks to the standard of punishment prescribed by a statute rather than to the sentence actually imposed. The constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the

wrongdoer." Lindsey v. Washington, 301 U.S. 397, 401 (1937). In Lindsey, at the time of the defendant's crime, Washington law provided for up to fifteen years in the state prison upon a conviction of larceny. An amendment to the law prior to trial made the fifteen year sentence mandatory, however, and the State argued that this new law should be applied to the defendant since it did not increase the final sentence. This Court held that such an application would be ex post facto and unconstitutional, emphasizing that the "practical operation" of the two statutes must be looked to, 301 U.S. at 400.

> "Removal of the possibility of a sentence of less than fifteen years, at the end of which Petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change . . . yet this is only a more striking instance of the detriment which ensues from the revision of the statute providing for a maximum and minimum punishment by making the maximum compulsory. We need not inquire whether this is technically an increase in the punishment annexed to the crime, see Calder v. Bull . . . It is plainly to the substantial disadvantage of Petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the fifteen year term." 301 U.S. at 401-402.

The Petitioner faced a no-less striking instance of the detriment ensuing from the revision of Fla.Stat., Section 775.082 (1) (1971).

In Warden v. Marrero, 417 U.S. 702 (1974), this Court addressed the problem of parole eligibility:

> "First, only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. . . . for the confined prisoner, parole -- even with its legal constraints - - is a long step toward regaining lost freedom. An observation made in somewhat different context is apt:
>
>> 'it may be "legislative grace" for congress to provide for parole but when it expressly removes all hopes of parole upon conviction and sentence for certain offenses, . . . this is the nature of an additional penalty.' *Durrant v. United States*, 410 F. 2d 689, 691 (Ca. 5 1969).
>
> Second, a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause of Article I, Section 9, Clause 3, of the Constitution, of whether it imposed a 'greater or more severe *punishment* than was prescribed by law at the time of the . . . offense.'" 417 U.S. at 663.

Ch. 72-724, Laws of Florida (1972), contains just such a repealer of parole eligibility.· The Florida Supreme Court acknowledged the *ex post facto* application of this repealer in *Lee v. State*, *supra*. The "serious question" of an *ex post facto* violation should therefore be considered by this Court.

B. EQUAL PROTECTION

1. The Petitioner, Ernest John Dobbert, Jr. and Rudolph Valentine Lee, the defendant in *Lee v. State*, *supra*, are the only two individuals charged with crimes alleged to have occurred prior to *Furman* and prior to the passage of Ch. 72-724, Laws of Florida (1972), who have been sentenced to die pursuant to *Fla.Stat.*, Section 921.141 and Section 775.082, as amended by Ch. 72-724. All defendants in the State of Florida whose crimes occurred prior to *Furman* and who were sentenced to die before *Furman* had their sentences commuted to life. *In Re Baker*, *supra*. In *Baker* the court noted that there would be equal protection problems unless it expeditiously sentenced all pre-*Furman* defendants to life imprisonment before a new statute, Ch. 72-118, Laws of Florida (1972), went into effect. As noted above, if only a few pre-*Furman* defendants were sentenced under this new statute, "a unique but factually undifferentiated class would be created, which was denied any chance of parole." 267 So. 2d 334 note 4. Such a "selective application (of the new statute) to an indisguishable few" would be "a seeming denial of equal protection." *Id.* at 335, and the court concluded that the best interest of the public was to have all pre-Furman defendants treated alike, *ibid.*

There were in fact defendants charged with pre-*Furman* offenses whose trials proceeded as non-capital punishment cases: *E.g.*, *State of Florida v. Edred Agustus Black*, Case No. 72-4821-CF, Division R, Circuit Court in and for Duval County, Florida, tried May 22 through May 24, 1974, *Prince v. State*, 297 So. 2d 648 (1st DCA Fla. 1974), *cert. den. on other grounds*, 304 So. 2d 129 (Fla. 1975). *Black* was tried after the decision of the First District Court of Appeal in *State v. Lee*, *supra*, which was decided on November 27, 1973; yet the trial court in the case sub judice relied on *State v. Lee* to support the trial of the Petitioner as a capital case.

The Fourteenth Amendment equal protection clause denies "to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Although, under this standard "a statutory discrimination will not be set aside if any state of facts reasonable may be conceived to justify it," *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), it is impossible to attribute any rational basis for the applicability of the death penalty to this Petitioner other than a single-minded purpose of the State of Florida to take his life.

The only distinction between the Petitioner and those inmates whose death sentences were commuted to life (with no restrictions on parole) pursuant to Anderson and Baker, supra, is that Petitioner was not charged, tried and convicted until approximately two years after Furman. The equal protection issue can be best illustrated by the following:

If Petitioner's wife had been charged as a co-defendant in the first degree murder of their daughter on December 31, 1971; and if she had been tried and convicted prior to Furman pursuant to Florida law in effect at that time; and if she had not received a recommendation of mercy from the jury; then, she would have had her death sentence commuted to life pursuant to Anderson and Baker. Petitioner is then apprehended, tried, convicted and receives a vote of ten to two for life imprisonment from a jury selected pursuant to the amended Florida law. The trial judge reverses the jury and gives the Petitioner a sentence of death. The disparate results are brought about solely due to the difference in the dates of the respective trials.

Where fundamental values are concerned, classifications must be closely scrutinized to insure that they correspond to valid State concerns urged as supporting them:

> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Harper v. Virginia Board of Elections, 383 U.S. 663, 669-670 (1966).

This Court should review the manner in which Petitioner was classified as an individual who should be sentenced to death.

2. The general savings provision of the Florida Constitution, Article X, Section 9, provides: "Repeal or amendment of a criminal statute shall not affect prosectuion or punishment for any crime previously committed." This provision of the 1968 Florida Constitution amended the earlier Article III, Section 32, of the 1885 Constitution which provided, "the repeal. or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment." These provisions have a long history in the case law of the State of Florida.

In Raines v. State, 42 Fla. 141, 28 So. 57 (1900), the plaintiffs in error, Raines, complained of being sentenced as a felon when the crime for which he had been convicted was converted by legislative act to a misdemeanor prior to sentencing. Citing the constitutional provision of the 1885 Florida Constitution the Florida Supreme Court said:

> ". . . but Section 32 of Article III of our constitution . . . prevents the said Chapter 4728 from affecting either the prosecution or the prior prescribed penalties for any crime committed prior to the taking effect of such ex post facto law. The effect of this constitutional provision is to give to all criminal legislation a prospective effectiveness; that is to say, the repeal or amendment, by subsequent legislation, of a pre-existing criminal statute, does not become effective, either as a repeal or as an amendment of such pre-existing statute, in so far as offenses are concerned that have been already committed prior to the taking affect of such repealing and amending law."

In Ex Parte Brown, 93 Fla. 332, 111 So. 518 (1927), the Supreme Court of Florida entertained a petition for habeas corpus filed by an individual under sentence of death for a crime which occurred prior to the passage of the Florida Statute authorizing death by electrocution. The original judgment of conviction of murder

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in the first degree had been reversed and upon a second conviction the sentence imposed was death by electrocution. Brown objected to the more humane method of execution and sought to have the sentence set aside as a violation of Article III, Section 32 of the 185 Florida Constitution. The court, citing Raines, supra, agreed with Mr. Brown and returned him to the local sheriff with directions that he be hanged in accordance with the law in effect at the time of the offense. See also, Sigsbee v. State, 43 Fla. 524, 30 So. 816 (1901), Whatley v. State, 46 Fla. 145, 35 So. 80 (1903), Gray v. State, 72 Fla. 487, 73 So. 583 (1916), Shields v. State, 78 Fla. 524, 83 So. 391 (1919); cf., Higginbotham v. State, 88 Fla. 26, 101 So. 233 (1924), Washington v. Dowling, 92 Fla. 601, 109 So. 588 (1926).

More recently, the Florida courts have utilized this state constitutional provision to defeat a sentence of four years in the state prison upon a revocation of probation when the maximum sentence at the time the individual was placed on probation was two years in the state prison, Rozinski v. State, 298 So. 2d 546 (2d DCA Fla. 1974); to uphold a sentence of seven yeras in the state prison when the maximum term had changed subsequent to the date of the offense. Ellis v. State, 298 So. 2d 527 (2d DCA Fla. 1974), cert. dismissed 298 So. 2d 411 (Fla. 1974). Accord, Cooper v. Wainwright, 308 So. 2d 182 (4th DCA Fla. 1975).

If Article X, Section 9 of the Florida Constitution of 1968 has not been rescinded by the Florida Supreme Court's decision in Dobbert, supra, the Petitioner should have been sentenced under the law in effect at the time the crime was committed. He should not have been singled out for punishment under the commission of his offense. Rozinski, supra.

Petitioner and Rudolph Valentine Lee are virtually the only individuals who have not received the benefit of Fla.Const., Art. X, Section 9 (1968). There can be no reasonable basis upon which the State of Florida can justify such an invidious discrimination.

II.

[illegible]

The denial of Petitioner's motion for change of venue in the trial court, affirmed by the Supreme Court of Florida below, presents a violation of the due process clause of the Fourteenth Amendment factually distinguishable from this Court's recent decision in Murphy v. Florida, 421 U.S. 794 (1975).

The sole question raised by Petitioner relevant to the issues ruled upon by this Court in Murphy, supra, is whether or not the trial setting was inherently prejudicial so as to suggest that a fair and impartial jury could not be selected to try the case.

The standard of Irvin v. Dowd, 366 U.S. 717 (1961), has not been altered by the decision in Murphy. This Court may set aside the conviction in the Florida court below if, after considering the totality of the circumstances, it is satisfied that the "fundamental principles of liberty and justice" necessary to ensure "those minimal historic safeguards for securing trial by reason" have been disregarded. McNabb v. United States, 318 U.S. 332, 340-341 (1943), citing Hebert v. Louisiana, 272 U.S. 312 (1926).

Applying this standard requires a factual, case by case comparison. Petitioner assumes that the decision in Murphy has not established archetypal prejudicial situations without which there can be no reversal. The day when cameras are allowed into the courtroom and reporters allowed to sit at counsel table is hopefully long past. State courts in general are not [illegible]

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that they ignore the teachings of such momentous rulings as *Sheppard v. Maxwell*, 384 U.S. 333 (1966), *Estes v. Texas*, 381 U.S. 532 (1965), and *Rideau v. Louisiana*, 373 U.S. 723 (1963). Their effect has been to generally improve the conditions in state jury trials and more particularly our method of handling the trials of spectacular, big-press cases from that which caused Mr. Justice Frankfurter to lament in *Irvin v. Dowd*:

> "More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. . . . (N)ot a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts. . . . exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of propossessions, evidence submitted in open court." 366 U.S. at 729, 730.

Indeed, the trial judge in the case sub judice acted, on the whole, reasonably in regard to the handling of publicity *during* the trial proper. The various court personnel and the attorneys on both sides were placed under a "gag-order" several days prior to jury selection. The order was issued *sua sponte* by the court. The jurors were properly admonished not to talk among themselves about the case during the voir dire and trial. The jurors were sequestered throughout the trial.

Petitioner, however, would ask this Court to review the publicity which *preceeded* any action by the trial court and

which led the prosecutor in the case to announce to the press following the conviction that this was the "biggest criminal trial in Jacksonville's history." (Appendix C, p. 40c, *infra*). Petitioner would offer the following factual items for the Court's consideration:

1. Petitioner was accused of the premeditated murder of two of his children and with the prolonged torture of the two surviving children. This was not an ordinary case under any circumstances and was the first such trial in Jacksonville. It soon became the "nortorious" Dobbert case (Appendix C, p. 75c, *infra*).

2. The press engaged in speculation concerning the whereabouts of the two missing children allegedly killed by Petitioner. The statement of the State's key witness, Ernest John Dobbert, III, was quoted and paraphrased in the Florida Times Union on April 13, 1972. (Appendix C, p. 49c-51c, *infra*). These stories served as the basis for all future stories speculating on possible gravesites for the missing children. (Appendix C, pp.1c, 106c, 110c, *infra*).

One video-tape film-clip shown at the hearing on Petitioner's Motion for Change of Venue on March 15, 1974, related the details of statements made by Ernest John Dobbert, III, *under hypnosis*. These statements, made available to Petitioner through pre-trial discovery, were not offered into evidence by the State at trial (apparently due to their doubtful admissibility).

3. The results of mental examinations ordered by the trial court to determine Petitioner's competency to stand trial and his sanity at the time of the alleged offenses were printed in the Florida Times Union on January 15, 1974. (Appendix C, p. 76c, *infra*).

4. A separate series of articles was printed relating the Petitioner's case to the rise in reporting of child abuse cases in Jacksonville (Appendix C, pp. 58c-59c, 75c, *infra*).

5. The report of Petitioner's arrest in Houston, Texas, was placed on the front page of both local papers in bold type in the manner usually reserved for presidential elections, assassinations or catastrophic world events (Appendix C, pp. 60c-64c, infra).

6. The hearing on Petitioner's Motion for Change of Venue included the testimony of twelve media representatives whose testimony disclosed the saturation effect of the media coverage of Petitioner's case (summary of the testimony appears at Appendix C, pp. 1c-9c, infra).

The following exchange during the voir dire examination illustrates the impact of the media coverage in the Jacksonville area:

(By defense counsel) "Q. Now, two questions that the Judge asked you. I'm not sure I remember them verbatim. He asked if you could set aside any prior opinions or prejudices that you might have formed and deliberate the case based on the evidence given to you and set aside any prior knowledge. Your answer was that you would try to set these aside. Now, you have heard about this case. Now, could you tell me how you might have heard about it, newspaper, television or discussion or how?

(By juror Robert C. Williams) A. Yes, I read articles in both newspapers.

Q. Do you subscribe to both papers?

A. Well, I might take the evening paper home with me. I don't subscribe to it.

Q. TV news coverage?

A. Yes.

Q. Now, the facts of the case or the situation when it first came to light was approximately two years ago. The crimes of which the defendant is accused happened over a three or four month period prior to that. Now, is it safe to say, you said you read most of the newspaper articles. Over the past two years you read about it and up until the present time?

A. Yes, up until Monday."

7. The press was allowed to sit within the bar during the voir dire examination and throughout the trial. Public outcry was heard in the courtroom directed against the Petitioner, causing Petitioner's attorney to comment, "I feel we're being exposed to anybody on the street. Everybody has something to say."

8. Of the eighty-eight jurors examined only thirteen said they had no knowledge of the facts of the case. Of the thirteen, only two actually sat on the final jury.

9. Unlike the publicity in which abated approximately seven months prior to the actual trial, the coverage in Petitioner's case was continuous. It began on the date of his son's statement to the police on April 13, 1972, carried through Petitioner's arrest in Texas and his ultimate extradition to Florida, and reached a peak of daily coverage during the weeks preceeding the trial. Coverage did not end with the conviction. Deep-seated feelings against Petitioner were exposed in letters released by the trial judge to the press following sentencing (Appendix C, pp. 41c, 46c, infra). The prosecutor participated in a post-trial summary of his trial preparation detailing his role in "the biggest criminal trial in Jacksonville's history" (Appendix C, p. 40c, infra).

Petitioner's efforts to obtain appellate review and the outcome of the appeal to the Supreme Court of Florida were reported as matters of continuing interest to local citizens.

10. The trial court and the attorneys agreed to select the jurors one at a time, in camera, due to the high risk of the answers' of one juror prejudicing those not yet questioned. After having interviewed twenty-seven jurors, with only five having no knowledge of the case, the trial court decided to abandon the in camera voir dire and began to call three jurors at a time. The court began timing the defense and the State on voir dire and repeatedly prompted the attorneys to speed up the selection. The

court again accelerated the process and began to call six jurors at a time (Appendix C, p. 15c, *infra*).[8]

The instances noted above do not exhaust the examples of the prejudicial effect of the publicity in Petitioner's case. A review of the voir dire examination shows that those jurors who expressed a firm opinion of Petitioner's guilt were excused, either for cause or peremptorily; yet challenges for cause remove the honest jurors -- those who admit that they cannot put aside the conscious and unconscious pressures exerted by the daily barrage from the local media:

(By defense counsel)	"Q.	Now, Mr. Alderman, you said that you had heard quite a bit about the case, is that correct, before you came to Court?
(By juror Archie G. Alderman)	A.	Yes.
	Q.	How did you hear about that?
	A.	Radio and TV.
	Q.	Did you say you followed it closely?
	A.	I didn't follow it deliberately. It was there. Every morning you turn TV on and see what is happening.
	Q.	Did you have a fixed opinion when you came in the Courtroom a few days ago as to the guilt or innocence of my client, Mr. Dobbert?
	A.	Yes.
	Q.	You did?
	A.	Yes.
	Q.	What was that opinion?
	A.	That he was guilty. . . . "

Where the crime charged is itself so inflammatory and emotive, the subtle pressures and opinion-producing elements

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[8] References to the record below have been deleted.

cannot be objectively measured so as to allow a court or an individual to point to juror number one or juror number twelve and say, "he is the one who did not admit that he could not put aside what he had heard and seen and read." As Justice Boyd said in his dissenting opinion below:

> "The Constitutions of the United States and Florida permit the news media to write extensively about crime and criminals and to discuss the gory details of crime before and during trials. This is a constitutional right that I recognize and respect; however, other constitutional provisions grant persons charged with crime the right to be tried fairly, under dur process of law, in an atmosphere of fairness and without prejudice in the minds of the jury. Rarely in the history of Florida has any crime created greater public attention than the activities of the Appellant in the treatment of his children, culminating in two convictions of murder and two convictions of child abuse (sic). It is my opinion that the court should have granted the motion for change of venue in order that the Appellant might be tried in some part of Florida in which the magnitude of his crimes was not so widely known and so freely discussed among the populace." *Dobbert*, *supra* at 443, 444, (Appendix A, *pp. 18a, 19a*, *infra*).

As in *Irvin*, *supra*, the buildup of publicity is clear and convincing and its effect was so prejudicial to the Petitioner as to raise this serious question of a violation of constitutional due process.

CONCLUSION

For the reasons stated above, the Court should grant a writ of certiorari to review the decision of the Supreme Court of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished to the Attorney General's Office, Capitol Building, Tallahassee, Florida, Clerk of the Supreme Court of Florida, Supreme Court Buiding, Tallahassee, Florida, and Petitioner, Florida State Prison, Raiford, Florida, by mail, this 31st day of August, A.D. 1976.

Louis O. Frost Jr.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 76-5306

ERNEST JOHN DOBBERT, JR.,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

SUPPLEMENTAL BRIEF for Petitioner IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 76-5306

ERNEST JOHN DOBBERT, JR.,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Pursuant to Rule 24(5) of the Rules of the Supreme Court of the United States, Petitioner would submit the following supplemental authority in support of his petition for writ of certiorari:

In an official opinion of the Attorney General of the State of Florida, number 972-75[1], dated March 10, 1972, an application of Article X, Section 9, of the 1968 Constitution of Florida was at issue. The question presented to the Attorney General was as follows:

> IN THE LIGHT OF CHAPTER 71-136, EFFECTIVE JANUARY 1, 1972, IS IT MANDATORY THAT A MAN CONVICTED OF RAPE BE SENTENCED TO LIFE IMPRISONMENT WHEN HE RECEIVES A RECOMMENDATION OF MERCY?

The Florida rape statute, prior to January 1, 1972, provided that upon a recommendation of mercy by the jury, a person convicted of rape would be sentenced to life *or any term of years*, within the discretion of the judge. The 1972 amendment removed the possibility of any sentence other than life imprisonment.

The Attorney General addressed the issue of a rape *committed* prior to January 1, 1972:

> "However, this change in penalties has no effect upon the punishment for rape committed prior to January 1, 1972, even though a conviction was not obtained until on or after that date; in such a case the penalty provided by Section 794.01, Florida Statutes *1969*, is to be imposed and this means that if there is a recommendation of mercy, the defendant may be sentenced to either life imprisonment or any term of years. This is so because Article X, Section 9, 1968 Constitution of Florida, provides that:
>
> > 'SECTION 9. Repeal of criminal statutes. - Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.'
>
> Turner v. State, 99 So. 334, 336 (Fla), illustrates the application of a former constitutional provision to exactly the same effect as said Article X, Section 9, viz., Article III, Section 32, Florida Constitution of 1885." 75 *Op. Atty. Gen.* (1972).

The Attorney General of the State of Florida thus has recognized the binding effect of Article X, Section 9 of the Florida Constitution. As was shown in the petition for writ of certiorari, the case law interpreting this provision has consistently upheld the view expressed in the Attorney General's opinion, *supra*.

The proper course of action for the trial court in the case sub judice was to first attempt to place the Petitioner in the same position he would have been if there had been no repeal or amendment of Florida Statutes, Sections 775.082(1) (1971) and

---

[1] This authority is submitted after the petition for certiorari. It was arguably "available" at an earlier date. Upon "Shepardizing" the opinions of the Attorney General of Florida and the Constitutional provision at issue, the cross-reference does not appear. The citation was discovered inadvertantly at a time subsequent to the submission of the petition.

921.141 (1971). Since death penalty provisions had been ruled unconstitutional by the time of Petitioner's trial, the trial court should have gone forward with the understanding that the maximum penalty remaining after Furman v. Georgia, 408 U.S. 238 (1972), and Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), would be life imprisonment.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

William P. White III
WILLIAM P. WHITE, III
CHIEF ASSISTANT PUBLIC DEFENDER

Fourth Judicial Circuit
221 Duval County Courthouse
Jacksonville, Florida 32202

Attorneys for Petitioner

76-5306

Supreme Court, U. S.
FILED
DEC 20 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5306

ERNEST JOHN DOBBERT, JR.,
Petitioner,

—*v.*—

STATE OF FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1976
CERTIORARI GRANTED NOVEMBER 8, 1976

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5306

ERNEST JOHN DOBBERT, JR.,

Petitioner,

—*v.*—

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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DOCKET ENTRIES

CRIMINAL DOCKET

SUPREME COURT OF FLORIDA

No. 45,558

ERNEST JOHN DOBBERT, JR.

vs.

STATE OF FLORIDA

DATE	PROCEEDINGS
1974	
May 17	Transfer Order—DCA-1st, Case #V-431, Notice of Appeal
Oct. 28	Appellant's Briefs & Summary of evidence w/ Index to Appendix B
1975	
Jan. 16	Briefs of Appellee State
Feb. 5	O.A. (Oral Argument) granted
Mar. 10	Reply Briefs of Appellant
Mar. 10	O.A. (Oral Argument) postponed til 4-3-75.
1976	
Jan. 14	Opinion (PC) Judgments and sentences of the Circuit Court appealed from are affirmed
Jan. 29	Pet. for Rehearing
Jan. 29	Motion for Stay Issuance of Mandate
Feb. 3	Response to Rehearing
Mar. 3	Motion for leave to Amend Rehearing
Apr. 29	Copy of Application for Stay in U.S. Supreme Court
May 6	Copy of U.S. Supreme Court Order Staying Proceedings (execution)

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, FALL TERM, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND SEVENTY-THREE.

STATE OF FLORIDA

vs

ERNEST JOHN DOBBERT, JR.

INDICTMENT FOR MURDER IN THE FIRST DEGREE AND CHILD TORTURE

IN THE NAME OF AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

FIRST COUNT

The Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, on the Thirty-First day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-One, in the County and State aforesaid, did commit various assaults upon one KELLY ANN DOBBERT and in some way and manner, and by kicking, choking, and torturing with his hands and feet, and by use of other instruments, and weapons to the Jurors unknown, he, the said ERNEST JOHN DOBBERT, JR., did then and there unlawfully, and from a premeditated design to effect the death of the said KELLY ANN DOBBERT, inflict and create in the said KELLY ANN DOBBERT certain mortal injuries and mortal sickness, a further description whereof is to the Jurors unknown, of which mortal injuries and sickness to the Jurors unknown, the said KELLY ANN DOBBERT then and there died, contrary to the provisions of Section 782.04, Florida Statutes, and against the peace and dignity of the State of Florida.

SECOND COUNT

And for a second count of this Indictment, the Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment made in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, between the First day of January and the Eighth day of April, both in the year of our Lord One Thousand Nine Hunderd and Seventy-Two, in the County and State aforesaid, did commit various assaults upon one RYDER SCOTT DOBBERT and in some way and manner, and by some means, instruments, and weapons to the Jurors unknown, he, the said ERNEST JOHN DOBBERT, JR., did then and there unlawfully, and from a premeditated design to effect the death of the said RYDER SCOTT DOBBERT, inflict and create in the said RYDER SCOTT DOBBERT certain mortal injuries and mortal sickness, a further description whereof is to the Jurors unknown, of which mortal injuries and sickness to the Jurors unknown, the said RYDER SCOTT DOBBERT then and there died, contrary to the provisions of Section 782.04, Florida Statutes, and against the peace and dignity of the State of Florida.

THIRD COUNT

And for a third count of this Indictment, the Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, during a period of time from on or about the First day of August, in the year of our Lord One Thousand Nine Hundred and Seventy-One until on or about the Eleventh day of April, in the year of our Lord One Thousand Nine Hundred and Seventy-Two, in the County and State aforesaid, did then and there unlawfully and wilfully torture and mutilate and cruelly, wantonly and with malice unlawfully punish and torment HONROE ELIZABETH DOBBERT, and in committing a battery upon the said HONORE ELIZABETH DOBBERT, did intentionally and knowingly cause great bodily harm, permanent disability and permanent disfigurement to the said HONORE ELIZABETH DOBBERT, a child under the age of sixteen (16) years, to-wit: five (5) years of age, contrary to the provisions of Section 828.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.

FOURTH COUNT

And for a fourth count of this Indictment, the Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, during a period of time from on or about the First day of August, in the year of our Lord One Thousand Nine Hundred and Seventy-One until on or about the Eighth Day of April, in the year of our Lord One Thousand Nine Hundred and Seventy-Two, in the County and State aforesaid, did then and there unlawfully and wilfully torture and mutilate and cruelly, wantonly and with malice unlawfully punish and torment ERNEST JOHN DOBBERT, III, and in committing a battery upon the said ERNEST JOHN DOBBERT, III, did intentionally and knowingly cause great bodily harm, permanent disability and permanent disfigurement to the said ERNEST JOHN DOBBERT, III, a child under the age of sixteen (16) years, to-wit: eleven (11) years of age, contrary to the provisions of Section 828.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.

/s/ Ervine C. Hilliard, Jr.
ERVINE C. HILLIARD, JR.
Foreman of the Grand Jury

/s/ Harry L. Shorstein
HARRY L. SHORSTEIN
Chief Assistant State Attorney, Fourth Judicial Circuit of Florida, In and For Duval County, Prosecuting for said State.

I, HARRY L. SHORSTEIN, Chief Assistant State Attorney, Fourth Judicial Circuit of Florida, in and for Duval County, hereby certify that I, as such Prosecuting Officer and as authorized and required by law, have advised the Grand Jury which returned this Indictment.

/s/ Harry L. Shorstein
HARRY L. SHORSTEIN
Chief Assistant State Attorney

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, FALL TERM, 1973

Case No. ——————

THE STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

INDICTMENT FOR MURDER IN THE FIRST DEGREE AND CHILD TORTURE

A TRUE BILL

/s/ Ervine C. Hilliard, Jr.
Foreman of the Grand Jury

WITNESSES FOR THE STATE

INV. G. H. PARKER
DR. PETER LIPKOVIC

Presented in open Court by the Grand Jury and filed this 27th day of December, 1973.

/s/ S. Morgan Slaughter
S. MORGAN SLAUGHTER
Clerk Circuit Court

By /s/ J. Z. Pearce
J. Z. PEARCE
Deputy Clerk

DONALD G. NICHOLS
State Attorney

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

MOTION

Comes now the Defendant by and through his undersigned attorney and moves that this Honorable Court enter an order specifying the manner of trial, number of trial jurors, and the penalties applicable to counts one and two of the indictment herein. As grounds for said motion, the Defendant would show unto the court:

1. The indictment herein only alleges a violation of Florida Statutes 782.04 and the undersigned attorney submits that there is presently great confusion in the law as to the manner of trial and the applicable penalties in a case where the alleged offense occurred at the time specified in this indictment.
2. The confusion exists as a result of the case of *State* v. *Lee*, Case No. R-452, 1st D.C.A. Fla., November 2, 1973, question certified to Florida Supreme Court January 7, 1974.
3. Unless this court enters its pre-trial order as requested, defense counsel is unable to properly advise the defendant herein and is unable to properly prepare a defense.

LOUIS O. FROST, JR.
Public Defender

By /s/ John Southwood
JOHN D. SOUTHWOOD
Chief Assistant Public Defender

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

MOTION FOR CONTINUANCE

Comes now the Defendant, by and through his undersigned attorney, pursuant to Rule 3.190(g), Rules of Criminal Procedure, and moves this Honorable Court to stay the setting of this case for trial and to continue the trial of this case indefinitely until the Florida Supreme Court renders its opinion in *State* v. *Lee*, Case No. 44,903.

As grounds for said motion, the Defendant would show unto the Court:

1. Count One and Count Two of the Indictment herein allege a violation of Florida Statutes 782.04 and the undersigned attorney submits that there is presently great confusion in the law as to the manner of trial and the applicable penalties in a case where the alleged offense occurred at the time specified in the Indictment.

2. The confusion exists as a result of the opinion rendered in the case of *State* v. *Lee*, (Case No. R-452, 1st D.C.A., November 2, 1973). Following is a chronology of this Case.

   November 2, 1973—Opinion rendered.

   January 7, 1974—Petition for Rehearing denied, Mandate issued, and case certified to Florida Supreme Court as a question of great public interest.

   January 22, 1974—Petition for Certiorari filed with Florida Supreme Court—Further trial court proceedings and mandate of the District Court of Appeals stayed pursuant to Rule 4.5c(6), Florida Appellate Rules.

   January 24, 1974—Petition for Certiorari granted by Florida Supreme Court—oral arguments set for March 14, 1974. (Case No. 44,903).

3. Until the Florida Supreme Court renders its opinion in *State* v. *Lee*, Counsel and this Court will be unable to determine the applicable law as to manner of trial, number of trial jurors, and the extent of the statutory penalties for the alleged offenses.

LOUIS O. FROST, JR.
Public Defender

By /s/ John Southwood
JOHN D. SOUTHWOOD
Chief Assistant Public Defender

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

CERTIFICATE OF GOOD FAITH

The undersigned counsel hereby certifies that the Motion for Continuance filed in this cause on January 30, 1974, was made in good faith and not as a means for unnecessary delay.

LOUIS O. FROST, JR.
Public Defender

By /s/ John Southwood
JOHN D. SOUTHWOOD
Chief Assistant Public Defender

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, FALL TERM, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND SEVENTY-THREE.

STATE OF FLORIDA

vs

ERNEST JOHN DOBBERT, JR.

INDICTMENT FOR MURDER IN THE FIRST DEGREE AND CHILD TORTURE

This Indictment amends Counts Three and Four of the original Indictment in Case Number 73-5068 that was returned by this same Grand Jury and presented in Open Court on the Twenty-Seventh day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-Three. The changes in Counts Three and Four merely limit the periods of time of the commission of the offenses. This Indictment is a continuation of the prosecution which began with the filing of the original Indictment on the Twenty-Seventh day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-Three. In addition to the evidence considered this day, the Grand Jurors have reconsidered all of the evidence presented to it on the Twenty-Seventh day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-Three in returning this Indictment.

IN THE NAME OF AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

FIRST COUNT

The Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, on the Thirty-First day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-One, in the County and State aforesaid, did commit various assaults upon one KELLY ANN DOBBERT and in some way and manner, and by kicking, choking, and torturing with his hands and feet, and by use of other instruments, and weapons to the Jurors unknown, he, the said ERNEST JOHN DOBBERT, JR., did then and there unlawfully, and from a premeditated design to effect the death of the said KELLY ANN DOBBERT, inflict and create in the said KELLY ANN DOBBERT certain mortal injuries and mortal sickness, a further description whereof is to the Jurors unknown, of which mortal injuries and sickness to the Jurors unknown, the said KELLY ANN DOBBERT then and there died, contrary to the provisions of Section 782.04, Florida Statutes, and against the peace and dignity of the State of Florida.

SECOND COUNT

And for a second count of this Indictment, the Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, between the First day of January and the Eighth day of April, both in the year of our Lord One Thousand Nine Hundred and Seventy-Two, in the County and State aforesaid, did commit various assaults upon one RYDER SCOTT DOBBERT and in some way and manner, and by some means, instruments, and weapons to the Jurors unknown, he, the said ERNEST JOHN DOBBERT, JR., did then and there unlawfully, and from a premeditated design to effect the death of the said RYDER SCOTT DOBBERT, inflict and create in the said RYDER SCOTT DOBBERT certain mortal injuries and mortal sickness, a further description whereof is to the Jurors unknown, of which mortal injuries and sickness to the Jurors unknown, the said RYDER SCOTT DOBBERT then and there died, contrary to the provisions of Section 782.04, Florida Statutes, and against the peace and dignity of the State of Florida.

THIRD COUNT

And for a third count of this Indictment, the Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, during a period of time from on or about the Twenty-Eighth day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-One until on or about the Eleventh day of April, in the year of our Lord One Thousand Nine Hundred and Seventy-Two, in the County and State aforesaid, did then and there unlawfully and wilfully torture and mutilate and cruelly, wantonly and with malice unlawfully punish and torment HONORE ELIZABETH DOBBERT, and in committing a battery upon the same HONORE ELIZABETH DOBBERT, did intentionally and knowingly cause great bodily harm, permanent disability and permanent disfigurement to the said HONORE ELIZABETH DOBBERT, a child under the age of sixteen (16) years, to-wit: five (5) years of age, contrary to the provisions of Section 828.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.

FOURTH COUNT

And for a fourth count of this Indictment, the Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, during a period of time from on or about the Twenty-Eighth day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-One until on or about the Eighth day of April, in the year of our Lord One Thousand Nine Hundred and Seventy-Two, in the County and State aforesaid, did then and there unlawfully and wilfully torture and mutilate and cruelly, wantonly and with malice unlawfully punish and torment ERNEST JOHN DOBBERT, III, and in committing a battery upon the said ERNEST JOHN DOBBERT, III, did intentionally and knowingly cause great bodily harm, permanent disability and permanent disfigurement to the said ERNEST JOHN DOBBERT, III, a child under the age of sixteen (16) years, to-wit: eleven (11) years of age, contrary to the provisions of Section 828.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.

/s/ Ervine C. Hilliard, Jr.
ERVINE C. HILLIARD, JR.
Foreman of the Grand Jury

/s/ HARRY L. SHORSTEIN
HARRY L. SHORSTEIN
Chief Assistant State Attorney, Fourth Judicial Circuit of Florida, In and For Duval County, Prosecuting for said State.

I, HARRY L. SHORSTEIN, Chief Assistant State Attorney, Fourth Judicial Circuit of Florida, In and For Duval County, hereby certify that I, as such Prosecuting Officer and as authorized and required by law, have advised the Grand Jury which returned this Indictment.

/s/ Harry L. Shorstein
HARRY L. SHORSTEIN
Chief Assistant State Attorney

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, FALL TERM, 1973

Case No. ———

THE STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

INDICTMENT FOR MURDER IN THE FIRST DEGREE AND CHILD TORTURE

A TRUE BILL

/s/ Ervine C. Hilliard, Jr.
Foreman of the Grand Jury

WITNESSES FOR THE STATE

INV. G. H. PARKER
DR. PETER LIPKOVIC

Presented in open Court by the Grand Jury and filed this 8th day of February, 1974.

/s/ S. Morgan Slaughter
S. MORGAN SLAUGHTER
Clerk Circuit Court

By /s/ J. Z. Pearce
J. Z. PEARCE

T. EDWARD AUSTIN
State Attorney

IN THE CIRCUIT COURT OF
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF DIV: "S"

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

ORDER ON MOTION

The within Motion coming on to be heard in open Court, defendant being present and arguments presented, It Is, Thereupon,

CONSIDERED, ORDERED AND ADJUDGED that said Motion be and the same is hereby the Court rules that this is a capital—death penalty with 12 man jury—

DONE AND ORDERED in open Court this 22 day of February A.D., 1974.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF
Judge

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

MOTION AND AFFIDAVIT FOR CHANGE OF VENUE

Defendant, Ernest John Dobbert, Jr., by and through his undersigned attorney, pursuant to Rule 3.240, Florida Rules of Criminal Procedure, moves this Honorable Court for an order removing this cause to another jurisdiction for trial.

As grounds for this motion, Defendant, being duly sworn, hereby deposes and sets forth:

1. That Defendant stands accused of acts which are inherently odious and subject to inflammatory exploitation by the press and the electronic news media.

2. That the acts of which Defendant stands accused have in fact been widely exploited by the press and the electronic news media to the extent that Duval County, Florida, has become irreparably permeated with prejudicial publicity.

3. That the extensive publicity concerning this Defendant has included detailed accounts of the investigation of the case, a search for bodies by certain members of the Jacksonville Police Department accompanied by television newsmen, the flight of the Defendant, his subsequent extradition and arrest and lengthy speculation concerning the probable development of the factual and legal issues to be decided at trial.

4. That, as a result of the extensive publicity in this case, Defendant has become known by name to the general populace of Duval County and Northeast Florida and that his name has come to be equated with the odious and infamous crime of child torture.

5. That the notoriety of this Defendant has been cited in the local press by an official employed by the Division of Family Services (State Department of Health and Rehabilitative Services) as a causative factor in the documented increase in reported cases of child abuse in Duval County, Florida.

6. That as a direct consequence of this extensive publicity and resulting notoriety, the atmosphere prevailing at this time, and likely to become exacerbated during the period immediately preceeding trial, is so laden with the possibility of prejudice to this Defendant that there is reason to believe that a fair and impartial trial cannot be had in Duval County, Florida.

STATE OF FLORIDA

COUNTY OF DUVAL

Before me, the undersigned authority, personally appeared Ernest John Dobbert, Jr., who being by me duly sworn, says the statements contained in the foregoing Motion for Change of Venue are true and correct according to his best knowledge and belief.

/s/ Ernest John Dobbert
ERNEST JOHN DOBBERT, JR.

SWORN and SUBSCRIBED to before me this 7 day of March, 1974.

/s/ Doyle Glass
DOYLE GLASS
Notary Public

I DO CERTIFY that the foregoing Motion for Change of Venue is made in good faith and not interposed for purposes of delay.

/s/ John Southwood
JOHN SOUTHWOOD
Attorney for Defendant

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

AFFIDAVIT IN SUPPORT OF MOTION FOR CHANGE OF VENUE

STATE OF FLORIDA

COUNTY OF DUVAL

Affiant being duly sworn deposes and says:

1. I am a practicing attorney in Jacksonville, Duval County, Florida, and have been such since 1970. I am currently a member of the firm of Mahon, Farley and Vickers.

2. Throughout my career my practice has consisted of litigative work. I served as Assistant Public Defender from November, 1970, until January of 1972, and as Assistant State Attorney from January, 1972, until March, 1973. Since then my work has regularly included a large amount of criminal defense work. I make it a point to keep current on local attitudes and feelings affecting the ability of local citizens to sit fairly as jurors.

3. I am aware of the extensive publicity which has surrounded the child torture-murder investigation culminating in the indictment of the defendant in the instant case. It has come to my attention through frequent discussions with numerous people concerning this case that local sentiment and feelings are strongly adverse to the defendant in this case and that opinions as to conviction and punishment have been formed as a result of the exposure given the case by the local news media.

4. I believe that, in light of this great media exposure permeating this community concerning both facts

and speculation about the instant case, the name Dobbert has come to be equated with child abuse and child torture and that this defendant cannot therefore receive a fair and impartial trial in Duval County, Florida. I do not believe local jurors with an awareness of this media exposure can expunge from their minds the inference of guilt thereunto appurtaining. I further believe that any remaining qualified jurors who are unaware of the extensive news coverage would not constitute a venire from which a fair cross-section of the defendant's peers in Duval County could be selected.

/s/ Bartley Vickers
BARTLEY VICKERS

SWORN and SUBSCRIBED to before me this 7th day of March, 1974.

/s/ Mary J. Phelps
MARY J. PHELPS
Notary Public

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

AFFIDAVIT IN SUPPORT OF MOTION FOR CHANGE OF VENUE

STATE OF FLORIDA

COUNTY OF DUVAL

Affiant being duly sworn deposes and says:

1. I am a practicing attorney in Jacksonville, Duval County, Florida, and have been such since 1952. I am currently a member of the firm of Lewis, Martin and Carter.

2. Throughout my career my practice has consisted of litigative work. During 1955 and 1956 I was an assistant county solicitor engaged in the prosecution of criminal cases on behalf of Duval County, Florida. Since then my work has regularly included a large amount of criminal defense work. I make it a point to keep current on local attitudes and feelings affecting the ability of local citizens to sit fairly as jurors.

3. I am aware of the extensive publicity which has surrounded the child torture-murder investigation culminating in the indictment of the defendant in the instant case. It has come to my attention through frequent discussions with numerous people concerning this case that local sentiment and feelings are strongly adverse to the defendant in this case and that opinions as to conviction and punishment have been formed as a result of the exposure given the case by the local news media.

4. I believe that, in light of this great media exposure permeating this community concerning both facts and speculation about the instant case, the name Dobbert has come to be equated with child abuse and child torture and that this defendant cannot therefore receive a fair and impartial trial in Duval County, Florida. I do not believe local jurors with an awareness of this media exposure can expunge from their minds the inference of guilt thereunto appurtaining. I further believe that any remaining qualified jurors who are unaware of the extensive news coverage or who are unaffected by prior information or opinions surrounding this case and this defendant would not constitute a venire from which a fair cross-section of the defendant's peers in Duval County could be selected.

/s/ Giles Lewis
GILES LEWIS

SWORN and SUBSCRIBED to before me this 6th day of March, 1974.

/s/ Mary J. Phelps
MARY J. PHELPS
Notary Public

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

AFFIDAVIT IN SUPPORT OF MOTION FOR CHANGE OF VENUE

STATE OF FLORIDA

COUNTY OF DUVAL

Affiant being duly sworn deposes and says:

1. I am a practicing attorney in Jacksonville, Duval County, Florida, and have been such since 1962. I am a member of the firm of Datz, Jacobson and Dusek.

2. Throughout my career my practice has consisted of litigative work. From July, 1962, through December, 1964, I served as Assistant United States Attorney for the Southern and Middle Districts of Florida. Since then my work has regularly included a large amount of criminal defense work. I make it a point to keep current on local attitudes and feelings affecting the ability of local citizens to sit fairly as jurors.

3. I am aware of the extensive publicity which has surrounded the child torture-murder investigation culminating in the indictment of the defendant in the instant case. It has come to my attention through frequent discussions with numerous people concerning this case that local sentiment and feelings are strongly adverse to the defendant in this case and that opinions as to conviction and punishment have been formed as a result of the exposure given the case by the local news media.

4. I believe that, in light of this great media exposure permeating this community concerning both facts and speculation about the instant case, the name Dobbert has come to be equated with child abuse and child torture and that this defendant cannot therefore receive a fair and impartial trial in Duval County, Florida. I do not believe local jurors with an awareness of this media exposure can expunge from their minds the inference of guilt thereunto appurtaining. I further believe that any remaining qualified jurors who are unaware of the extensive news coverage or who are unaffected by prior information or opinions surrounding this case and this defendant would not constitute a venire from which a fair cross-section of the defendant's peers in Duval County could be selected.

/s/ Samuel S. Jacobson
SAMUEL S. JACOBSON

SWORN and SUBSCRIBED to before me this 6th day of March, 1974.

/s/ Albert J. Datz
ALBERT J. DATZ
Notary Public

Notary Public, State of Florida at Large, My Commission Expires Dec. 1, 1977, Bonded by American Fire & Casualty Co.

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

ORDER

This Court now has pending before it a Motion for Change of Venue and hearing will be held on such Motion on Friday, March 15, 1974. That said Motion for Change of Venue is based in whole or in part upon various news media stories about this case.

That it is the concern and obligation of this Court in this and in every criminal case to see that the defendant is accorded a fair trial and in furtherance of that obligation this Court has entered the following Order which is binding upon everyone occupying an official position having to do with this case and this includes the State Attorney, and all of his assistants and employees, the Sheriff and all of his deputies and employees, the Clerk of the Circuit Court and all of his deputies and employees, the Public Defender and all of his assistants and employees, the defendant, all of the officers of this Court, the witnessees for the State and the defense and anyone else connected with this case.

That none of the named persons will release any statement about this case to any news media at any time before or during this trial until it shall have been completed and disposed of.

This order does not prohibit the giving by anyone of the date and time of Court hearings or the time and date of the trial.

Copies of this order will immediately be served upon the State Attorney, the Public Defender, the Clerk of the

Circuit Court, the Sheriff and the witnesses as they come before the Court, and shall be binding upon each of them, their assistants, agents, deputies, and employees and for any violation hereof there will be proceedings in criminal contempt.

DONE and ORDERED in Chambers at Jacksonville, Duval County, Florida, this the 12th day of March, 1974.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF
Circuit Judge

IN THE FOURTH CIRCUIT COURT OF
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF DIV: "S"

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

ORDER ON MOTION AND AFFIDAVIT FOR CHANGE OF VENUE

The within Motion coming on to be heard in open Court, defendant being present and arguments presented, It Is, Thereupon,

CONSIDERED, ORDERED AND ADJUDGED that said Motion be and the same is hereby Motion under advisement, after one day of testimony & evidence, till it is determined from jury selection—if it possible to get a fair & impartial jury.

DONE AND ORDERED in open Court this 15 day of A.D., 1974.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF
Judge

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT

ADVISORY SENTENCE

We, a majority of the jury, rendering an advisory sentence to the Court as to whether the defendant should be sentenced to death or to life imprisonment, find:

1. Sufficient aggravating circumstances
   do not
   exist to justify a sentence of death.
2. Sufficient mitigating circumstances
   do
   exist, which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.
3. Based on those considerations, the defendant should be sentenced to
   life imprisonment

DATED: 3-30-, 1974.

/s/ Gary D. Thomas
GARY D. THOMAS
Foreman/Forewoman

/s/ Joyce L. Green
JOYCE L. GREEN

/s/ W. F. Dan Ane
W. F. DAN ANE

/s/ Rufus Williams
RUFUS WILLIAMS

/s/ Betty J. Price
BETTY J. PRICE

/s/ Jacquelynn R. Fernandez
JACQUELYNN R. FERNANDEZ

/s/ Teresa Wright
TERESA WRIGHT

/s/ Michael Gladin
MICHAEL GLADIN

/s/ Maxine Royster
MAXINE ROYSTER

/s/ T .H. Youngblood
T. H. YOUNGBLOOD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

MOTION FOR NEW TRIAL

Comes now the Defendant, by and through his undersigned attorney, and pursuant to Rules 3.590 and 3.600 Rules of Criminal Procedure, respectfully moves this Honorable Court to order a new trial for the Defendant in the above styled cause on the following grounds:

1. The Court erred in denying the Defendant's Motion for Judgment of Acquittal made at the close of the State's case.
2. The Court erred in denying the Defendant's Motion for Judgment of Acquittal made at the close of all the evidence.
3. The verdicts are against the weight of the evidence.
4. The verdicts are contrary to the law.
5. The verdicts are contrary to the evidence.
6. The Defendant could not and did not receive a fair and impartial trial due to extensive pre-trial publicity which permeated the entire jury venire and the Court erred in denying the Defendant's Motions for Change of Venue.
7. The Defendant could not and did not receive a fair and impartial trial on each of the four counts because the Court erred in denying Defendant's pre-trial Motion for Severance which was renewed at the close of the State's case.
8. The Court erred in failing to require the State to respond with greater particularity to Defendant's Motion for Statement of Particulars.

9. The Court erred in allowing the State to introduce evidence of collateral crimes prior to introduction of evidence to prove the corpus delecti.
10. The Court erred in allowing the State to introduce evidence of collateral crimes.
11. The Court erred in allowing the State to introduce admissions, statements, and confessions of the Defendant prior to introduction of evidence to prove corpus delecti.
12. The Court erred in allowing the introduction of hearsay evidence on the premise that hearsay is admissible if said in the presence of the Defendant.
13. The Court erred in allowing the State to propound hypothetical questions to experts based on facts not in evidence.
14. The Court erred in allowing the State to introduce photographs of one victim, Ernest John Dobbert III, said photographs being inflammatory and serving no relevant purpose.
15. The Court erred in denying the Defendant's Motion to Suppress Evidence.
16. The Court erred in denying Defendant's requested Jury Instructions on the First and Second Count as to attempted murder in all four degrees, aggravated assault, aggravated battery, and assault and battery.
17. The Court erred in denying Defendant's requested Jury Instructions on the Third and Fourth Count as to aggravated assault, aggravated battery, and assault and battery.

WHEREFORE, the Defendant prays that this Honorable Court will order a new trial in this cause.

Respectfully submitted

LOUIS O. FROST, JR.
Public Defender

By /s/ John Southwood
JOHN D. SOUTHWOOD
Chief Assistant Public Defender

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF DIV: "S"

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

ORDER ON MOTION FOR NEW TRIAL

The within Motion coming on to be heard in open Court, defendant being present and arguments presented, It Is, Thereupon,

CONSIDERED, ORDERED AND ADJUDGED that said Motion be and the same is hereby denied—after argument in open Court.

DONE AND ORDERED in open Court this 12 day of April, A.D., 1974.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF
Judge

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No. 73-5068 Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

SENTENCE

The defendant was indicted for the crimes of Murder in the First Degree of Kelly Ann Dobbert, age 9, and Ryder Scott Dobbert, age 7, and the Child Torture of Honore Elizabeth Dobbert, age 5 and Ernest John Dobbert, III, age 11.

The Jury found the defendant guilty of Murder in the First Degree of Kelly Ann Dobbert, Guilty of Murder in the Second Degree of Ryder Scott Dobbert, Guilty of Child Torture of Ernest John Dobbert, III, and Guilty of Child Abuse of Honore Elizabeth Dobbert.

The Court having heard all of the evidence in this case, and having heard and denied Motion for a New Trial, does hereby adjudge the defendant guilty of each of the counts of which he has been found guilty and sentences him as follows:

A. As to the crimes of Murder in the Second Degree, Child Torture and Child Abuse, I hereby impose the maximum sentence on each count. These sentences are to run consecutively each to the other.

B. The sentences imposed in the case above of Murder in the Second Degree, Child Torture and Child Abuse are to be served consecutive with the sentence which the Court imposes below for the crime of Murder In The First Degree. Ordinarily it would be a useless act to run sentences for Murder in the Second Degree, Child Torture and Child

Abuse consecutive to the maximum sentence for Murder In The First Degree. This is done in this case for the reason that there are now before the Courts legal challenges to the maximum penalty in first degree murder cases. Should such challenges prevail this Court would re-impose the maximum possible sentence for Murder in the First Degree and run the sentences for Murder in the Second Degree, Child Torture and Child Abuse consecutive thereto.

Before imposing the sentence for Murder in the First Degree the Court has closely examined and written its findings as to each of the elements of aggravation and/or mitigation which are set forth in Florida Statutes and which were guide-lines for the Jury in considering its Advisory Sentence.

The Court has summarized the facts as brought out in the trial and in the pre-sentence investigation report and applied them to each element of aggravation and/or mitigation where such elements are applicable.

In summarizing these elements of aggravation and/or mitigation, the Court has listed them in reverse order as follows:

MITIGATING CIRCUMSTANCES

A. WHETHER DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FACT:

That on 9-20-65 the Police of St. Francis, Wisconsin, arrested the defendant for "Battery—Child", in that he "struck Ernest John Dobbert, III, age 5 years, several times causing a black eye, a large bruise on the upper forehand and red swollen cheeks and nose."

The Judge of that Court sent the defendant to a Hospital for mental observation and placed him on one year probation.

FACT:

That on 11-17-67 the Police of St. Francis, Wisconsin, arrested the defendant on the charge of "Assault", in that instance the report states that the defendant "disciplined his son, Ernest John Dobbert, III, for poor grades by burning his hands over an open flame on a gas range."

The defendant was found guilty and incomprehensibly the Judge of that Court only fined the defendant $50.00 and imposed no further punishment. This was only two years after he had been placed on probation for battery on Little John in 1965.

FACT:

The evidence and testimony of John III and neighbors at the trial and the defendant's own written statement was that he was constantly beating the children with fists, boards and other objects and was seen kicking, chocking and beating Kelly Ann Dobbert, Ryder Scott Dobbert, Ernest John Dobbert, III and Honore Elizabeth Dobbert. The neighbors made their complaints to the Police and Social Welfare Agencies, but the defendant was able to avoid a thorough investigation of the charges by deceit, lies and by the murder of Kelly Ann and Ryder Scott Dobbert.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there was a significant history of prior criminal activity towards the children in both Wisconsin and Jacksonville, Florida.

B. WHETHER THE MURDER WAS COMMITTED WHILE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

FACT:

The defendant did not testify, however, his written statement did indicate that he thought he was under an emotional strain. However, that statement was more of a recitation of torture of the children than the establishment of any emotional strain.

FACT:

The defendant was examined by two psychiatrists and a psychologist prior to trial and found to be sane and competent at the time of examination and at the time of the crimes. The psychiatrists both stated that at the time of the crime he understood the nature, quality and wrongfulness of his acts, and knew right from wrong and was able to adhere to the right. Neither the psychiatrists or psychologist found or reported that he was under the influence of extreme mental or emotional disturbance at the time of the crimes.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there is little, if any, evidence that defendant was under the influence of extreme mental or emotional disturbances at the time of the crimes. Perhaps the best description of his emotional state then, and at the time of the crime was given by the psychiatrist, Dr. Ernest Miller, in his written report of November 8, 1973, in which he said:

"Mr. Dobbert is an immature, egocentic individual, hedonistic and basically insensitive to the real needs of other persons, given to impulsive behavior designed to provide immediate gratification for himself." The Doctor went on to say, "defect in conscience is also apparent, both punitive and preventive components being either attenuated or absent altogether."

C. WHETHER THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

FACT:

The defendant murdered his own nine year old daughter, Kelly Ann Dobbert by continuous beatings, kicking, hitting with fist and other objects, choking, sewing up her cuts with needle and thread and other torture and depriving her of medical care and finally murdered her, placed her body in a plastic garbage bag and buried here in an unknown and unmarked grave.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the defendant murdered his own 9 year old child—who could not have voluntarily participated or consented to it.

D. WHETHER THE DEFENDANT WAS AN ACCOMPLICE IN THE MURDER COMMITTED BY ANOTHER PERSON, AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR.

FACT:

The evidence at the trial showed that defendant alone did the murder. It showed that his wife was in jail in Wisconsin and his Mother was also in Wisconsin and that he was the only adult living in the home. The facts also proved that defendant locked the children inside the home during his absence and confined them to the house when he was present with them and that he actively prevented outsiders, by lies, and subterfuge, from entering the home. The only evidence of torture, beatings and murder were those done by the defendant alone.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

E. WHETHER THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:

No element of duress was ascertained by the psychiatrists as set forth in paragraph B. above. There is absolutely no testimony of duress in any degree which would justify the hideous crimes of which he was convicted. If, he suffered duress over the care and welfare of the children, there was help available but he turned away both Police and Family Services Workers before the murder of Kelly Ann and Ryder Scott Dobbert by lies and deception and by pretending all in the home were well and normal.

FACT:

There was no evidence that defendant was under substantial domination of another person. His wife was alternately in jail in Jacksonville, and Wisconsin for worthless checks and his mother was also in Wisconsin and he had no other relative in Jacksonville. While his wife was in the City Prison Farm in Jacksonville she caused the police to visit the Dobbert home to see to the welfare of the children because on a visit the defendant told her of the injuries suffered by the children and his punishment of them. Her influence, if any, was for him to look after and protect the children.

From a reading of the pre-sentence investigation report which is attached hereto as EXHIBIT #1.

It appears that his wife was under his domination to do criminal acts (cash worthless checks) for which she was later jailed.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

F. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

FACT:

As stated in paragraph B above, both psychiatrists made written reports to this Court that defendant was competent, sane and able to understand the nature, quality and wrongfulness of his acts both at the time of crime and at the time of examination, and able to adhere to the right.

By Order of this Court the defendant was examined by Dr. Ernest Miller, M. D., an experienced psychiatrist practicing in Jacksonville, Florida, with years of experience in examining persons charged with crimes. Dr. Miller has testified as an expert in psychiatry in this Court and other Courts in this County and throughout the State of Florida. Dr. Helen Byrd, Staff Psychologist of the Community Mental Health Center—made psychological testings of Mr. Dobbert at the request of Dr. Miller.

Dr. George Bernard, M. D., Psychiatrist, at the University of Florida J. Hillis Miller Medical Center in Gainesville, Florida, with years of experience in examing persons charged with crimes and who has testified in this Court and other Courts of the State as a expert in his field.

Excerpts of their findings are set forth below, and copies of their entire reports are attached hereto as EXHIBITS 2, 3 and 4.

Dr. Miller reported that "Mental status, neurological, psychological and electroencephalographic examinations reveal no evidence of discreet or diffuse disease of the brain or of a significant disturbance in cognition, reality testing, reasoning or emotional control." The Doctor further stated that "his general fund of information is good. RAIT assessment places the intelligence at approximately 107 on the Wechsler Scale, which is in the average range. He is able to register, recall and retain information adequately. His verbal and mathematical abstractive ability is excellent, as indicated by his responses to word association tests and proverb analysis."

Dr. Miller concluded his report by stating that:

"In my opinion, the patient is at the present time mentally competent to proceed with trial, able to understand the charges facing him and to adequately assist counsel in his own defense. It is my opinion, as well, that at the time of the alleged offense the patient was mentally competent, able to understand the nature, quality and wrongfulness of his acts." "MR. DOBBERT IS AN IMMATURE, EGOCENTRIC INDIVIDUAL, HEDONISTIC AND BASICALLY INSENSITIVE TO THE REAL NEEDS OF OTHER PERSONS, GIVEN TO IMPULSIVE BEHAVIOR DESIGNED TO PROVIDE IMMEDIATE GRATIFICATION FOR HIMSELF. PASSIVE-AGGRESSIVE AND MANIPULATIVE MECHANISMS ARE ALSO EMPLOYED, AS WELL AS

HIS TENDENCY TO RATIONALIZE, DENY AND PROJECT ONTO OTHER PERSONS RESPONSIBILITY FOR HIS OWN DIFFICULTIES. DEFECT IN CONSCIENCE IS ALSO APPARENT, BOTH PUNITIVE AND PREVENTATIVE COMPONENTS BEING EITHER ATTENUATED OR ABSENT ALTOGETHER."

Dr. Byrd reported that "When asked the standardized questions regarding how he would act in a social situation, he would ask if the question meant to give the practical sensible response or what he would actually do. There was indeed a difference in that for the most part he knows what behavior is socially acceptable, but he is more apt to respond in a way which satisfies his drive. He was not the least bit hesitant to indicate his thoughts as opposed to the mores of society at large, nor did he give any evidence that he should have some feeling of guilt in opposing the moral code of the majority." Dr. Byrd concluded that "Two things clearly indicated by his responses were the absence of thought disorder and the ability to exercise rational, critical control over basic impulses when he perceives that allowing their expression, even verbally, might work to his advantage."

Dr. Bernard reported that "It is my medical opinion the prisoner is competent and able to assist counsel in the preparation of his defense. It is also my medical opinion he was competent at the time of the alleged crime, knowing right from wrong and being able to adhere to the right."

FACT:

The defendant did not testify nor did he produce any witnesses in his own behalf and there was absolutely no evidence that his capacity to appreciate the criminality of his conduct or to conform it to law was substantially impaired. The fact is, that just the opposite was true as shown by the reports of the experts who examined him.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the expert opinions agree that he was mentally competent and able to understand the nature, quality and wrongfulness of his acts at the time of the crimes and had average intelligence.

G. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

FACT:

The defendant was born February 26, 1938, and was 33 years of age at the time of the murder of Kelly Ann Dobbert. He was a six foot-two inch white male weighing approximately two hundred and ten pounds. The report of the doctors showed that he was physically mature with average intelligence and without any impaired reasoning process.

CONCLUSION:

There is no mitigating circumstance under this paragraph. The defendant was a man of mature physical and mental years and of average intelligence.

CONCLUSION OF COURT

There are no mitigating circumstances existing—either statutory or otherwise—which outweighs any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.

The Court now summarizes the facts brought out in trial and the pre-sentence investigation and applies them to the elements of aggravation which were considered by the Jury in arriving at their Advisory Sentence.

AGGRAVATING CIRCUMSTANCES

A. WHETHER THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER OF WHICH HE WAS CONVICTED.

FACT:

The defendant was not imprisoned at the time of the murder. He did actually prevent arrest, prosecution and imprisonment for his crime by terrorizing and brutalizing his victims and by lies and deception towards the Police and Social Agencies.

FACT:

The defendant had previously been twice arrested and found guilty of crimes against one of his children in Wisconsin in 1965 and 1967 (see paragraph A, under Mitigating Circumstances above herein.)

CONCLUSION:

This is an aggravating circumstance because although defendant was not imprisoned at the time of the murder—he had been previously convicted of crimes against child and he prevented arrest, prosecution and imprisonment by lies, deception and murder.

B. WHETHER THE DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OF THREAT OF VIOLENCE TO THE PERSON.

FACT:

That on 9-20-65 the Police in St. Francis, Wisconsin, arrested the defendant on the charge of "Assault", in that instance the report states the defendant "Disciplined his son, Ernest John Dobbert, III, for poor grades by burning his hands over an open flame on a gas range."

FACT:

That on both the Wisconsin charges he was found guilty. Whether the crimes were misdemeanors or felonies in Wisconsin—is not known to this Court. The point is—that such crimes did involve the use of violence to another person—a helpless 5 year old child.

FACT:

The evidence of little John III, the neighbors at trial were that in the past the defendant had committed crimes of violence against the children by constantly beating them with fists, boards and other objects and was seen hitting, kicking, choking, and beating Kelly Ann Dobbert, Ryder Scott Dobbert, Ernest John Dobbert, III, and Honore Elizabeth Dobbert. The fact that he was not previously convicted of these felonies should not be seriously considered because he terrorized, brutalized and generally prevented detection by secreting helpless children over whom he had absolute control.

CONCLUSION:

There is an aggravating circumstance here because defendant was previously convicted of crimes of violence against children had prevented further conviction of a felony by his tyrannical control over the victims of his crimes.

C. WHETHER, IN COMMITTING THE MURDER OF WHICH HE HAS JUST BEEN CONVICTED, THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

FACT:

After the defendant murdered Kelly Ann Dobbert—he murdered Ryder Scott Dobbert and the defendant also tortured and abused the other children.

CONCLUSION:

There is an aggravating circumstance under this paragraph because not only did the defendant's murder of Kelly Ann knowingly create great risk of death to others—it was followed by the murder of Ryder Scott. A great risk of death was also created by defendant towards the two surviving children.

D. WHETHER THE MURDER OF WHICH DEFENDANT WAS CONVICTED WAS COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

This does not seem to be applicable to the circumstances of this case.

E. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

FACT:

The evidence and testimony showed that defendant constantly beat Kelly Ann Dobbert, kicked and hit her with fists and other objects—caused her to be violently and chronically ill from such torture and that she was scarred, battered and bruised. That to prevent her condition from being known to the authorities, the defendant locked her inside the home in his absence, confined her to the house when he was present and finally murdered her, placed her body in a plastic garbage bag and buried her in an unknown and unmarked grave. All of which was done to prevent discovery of her condition and to avoid his arrest.

CONCLUSION:

There is an aggravating circumstance here in that he did the murder of his daughter to avoid and prevent his arrest.

F. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR PECUNIARY GAIN.

FACT:

This does not seem applicable to the present case.

G. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS:

FACT:

This does not seem to be applicable to the facts in the present case except as it refers to hinder enforcement of laws, and that aspect has been covered above—where his efforts to avoid arrest by murder, have been enumerated.

H. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

FACT:

The defendant stands convicted of first degree murder of his 9 year old daughter, Kelly Ann Dobbert, second degree murder of his 7 year old son, Ryder Scott Dobbert, torture of his 11 year old son, Ernest John Dobbert, III, and child abuse of his then 5 year old daughter, Honore Elizabeth Dobbert.

FACT:

The evidence and testimony showed premeditated and continuous torture, brutality, sadism and unspeakable horrors committed against all of the children over a period of time. The crimes were committed against the children constantly and it is difficult to separate the specific acts against the individual child. What was done to one—short of causing blindness and murder—was done to all. However, the Court has set forth below some of the cruel and brutal acts against Kelly Ann—in so far as trial notes and memory of testimony serve me correctly.

Over the period of time of the latter portion of Kelly Ann's short, tortuous life the defendant did these things to her on one or many occasions:

1. Beat her in the head until it was swollen.
2. Burned her hands.
3. Poked his fingers in her eyes.
4. Beat her in the abdomen until "it was swollen like she was pregnant."

5. Knocked her against a wall and "when she fell, kicked her in the lower part of the body."
6. Held her under water in both the bath tub and toilet.
7. Kicked her against a table which cut her head—then defendant sewed up her wound with needle and thread.
8. Scarred her head and body by beating her with a belt and board—causing marks from her cheek, across the neck and down her back—which injuries worsened without treatment "until the body juices came out".
9. On one occasion beat her continuously for 45 minutes.
10. On many occasions kicked her in the stomach with his shoes on, and on the night she died he kicked her a number of times.
11. Kept her out of school so that the many scars, cuts and bruises on her body would not be seen by others.
12. Defendant made no effort to get professional medical care and attention for the child and in fact actively prevented any out-siders from discovering her condition.
13. Choked her on the night she died and when she stopped breathing he placed her body in a plastic garbage bag and buried her in an unmarked and unknown grave.

CONCLUSION:

The murder of which the defendant has been convicted was especially heinous, atrocious and cruel. If it is not—then what crime is?

CONCLUSION OF THE COURT

There are sufficient and great aggravating circumstances which exist to justify the sentence of death.

In concluding my findings I would like to point out that my 22 years of legal experience have been almost exclusively in the field of criminal law.

The Judge of this Court has been a defense attorney of criminal cases, a prosecutor for eight and one half years and a Criminal Court Judge and a Circuit Judge—Felony Division for three and one half years.

During this 22 years I have defended, prosecuted and held trial of almost every type of serious crime. During these years of legal experience I have never known of a more heinous, atrocious and cruel crime than this one.

My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. During World War II, I was a United States Army Paratrooper and served overseas in ground combat. I have had friends blown to bits and have seen death and suffering in every concievable form.

I am not easily shocked or effected by tragedy or cruelty—but this murder of a helpless, defenseless and innocent child is the most cruel, atrocious and heinous crime I have every personally known of—and it is deserving of no sentence but death.

Having adjudged you guilty of Murder in the First Degree I hereby sentence you to death. I order that you be taken by the proper authorities to the Florida State Prison and there kept in close confinement until the date of your execution be set. That on such day you be put to death by having electrical currents passed through your body in such amounts and frequency until you are rendered dead.

I advise you that you have thirty days from today to take an appeal from the sentences which I have just imposed upon you and I hereby appoint the

Public Defender's Office to represent you on the appeal.

May God have mercy upon your soul.

DONE and ORDERED and SENTENCED in Open Court at the Duval County Courthouse, Jacksonville, Florida, on this the 12th day of April, 1974.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF
Circuit Judge

SUPREME COURT OF FLORIDA

No. 45558

Jan. 14, 1976

ERNEST JOHN DOBBERT, JR., APPELLANT

v.

STATE OF FLORIDA, APPELLEE

REHEARING DENIED APRIL 5, 1976

By a judgment of the Circuit Court, Duval County, R. Hudson Olliff, Jr., the defendant was convicted of first-degree murder, second-degree murder, child torture and child abuse and he appealed. The Supreme Court held that there was no reversible error in failing to charge on attempted homicide, that trial judge who did everything possible to insure an impartial trial for defendant did not abuse discretion in denying motion for change of venue and that trial court after considering all the mitigating and aggravating circumstances properly imposed death penalty for the murder conviction.

Affirmed.

Boyd, J., filed a dissenting opinion.

England, J., filed an opinion concurring in part and dissenting in part.

Overton, J., filed an opinion concurring specially.

1. Criminal Law—795(1)

Under Criminal Procedure Rule relating to giving of charge on attempt, trial judge must determine in every case as a matter of law whether an attempt to commit crimes charged would itself constitute an offense under Florida law, and if he determines that it does, then he must instruct jury on the subject of such attempt and jury may find him guilty accordingly, regardless of whether accusatory pleading specifically charges an attempt and even though in opinion of trial judge proof established guilt of crime charged rather than a mere attempt to commit it. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.510.

2. Homicide—341

Where trial judge instructed jury on murder in the first, second, and third degrees as well as manslaughter and justifiable and excusable homicide and further stated that if jury returned a verdict of guilty it should be for the highest offense which has been proved beyond reasonable doubt, trial judge did not commit reversible error in failing to instruct on attempted homicide in prosecution in which jury returned a first-degree conviction. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.510.

3. Criminal Law—121

Trial judge who did everything possible to insure an impartial trial for defendant, charged with two counts of murder and two counts of child torture, by allowing careful and extensive examination by defense counsel, by sequestering jury and by placing a comprehensive gag order on all participants of trial did not abuse discretion in denying motion for change of venue.

4. Homicide—354

Upon considering all the mitigating and aggravating circumstances and upon careful review of entire record showing defendant's history of child abuse and torture, trial court properly imposed death penalty on defendant for the first-degree murder of his child.

Louis O. Frost, Jr., Public Defender, James O. Brecher and Steven E. Rohan, Asst. Public Defenders, for appellant.

Robert L. Shevin, Atty. Gen., Harry L. Shorstein, Sp. Asst. Atty. Gen., and Carolyn M. Snurkowski, Asst. Atty. Gen., for appellee.

PER CURIAM.

Appellant was indicted on two counts of murder in the first degree and two counts of child torture in that he did commit various assaults upon Kelly Ann Dobbert including kicking, choking, and torturing her with his hands and feet and by use of other instruments and weapons and that from a premeditated design to effect death, he inflicted mortal injuries upon Kelly Ann which resulted in her death; in that he committed various assaults upon Ryder Scott Dobbert and from premediated design to effect Ryder Scott's death, he inflicted mortal injuries resulting in Ryder Scott's death; in that he willfully tortured, mutilated, cruelly, wantonly and maliciously punished and tormented Honore Elizabeth Dobbert, a child, five years of age, and in committing battery upon her did intentionally and knowingly cause great bodily harm, permanent disability and permanent disfigurement to Honore; and in that he willfully tortured, mutilated, cruelly, wantonly, maliciously, and unlawfully punished and tormented Ernest John Dobbert, III, which caused serious bodily harm, permanent disability and permanent disfigurement to Ernest John, III, a child of eleven years of age. Appellant moved to dismiss the indictment which motion was denied as to counts one and two charging murder in the first degree but was granted as to counts three and four charging child torture. Subsequently, the Grand Jury returned an amended indictment charging two counts of murder in the first degree and two counts of child torture. A motion by appellant to sever counts one and two from the indictment was denied. Appellant filed a motion and affidavit for change of venue which alleged, inter alia, that defendant stands accused of acts inherently odious and subject to inflammatory exploitation by the press and that as a consequence of extensive publicity, the possibility of prejudice to him was great. The trial court, before ruling on a change of venue, entered an order which he stated was binding upon everyone occupying an official position having to do with this case including the State Attorney, and all of his assistants and employees, the Sheriff and all of his deputies and employees, the Clerk of the

Circuit Court and all of his deputies and employees, the public defender and all of his assistants and employees, the defendant, all of the officers of this court, the witnesses for the State and the defense and anyone else connected with this case. Thereby, he orderd that none of the named persons will release any statement about this case to any news media at any time before or during this trial until it shall have been completed and disposed of. After hearing, he then took the motion for change of venue under advisement until after jury selection was attempted.

Pursuant to Rule 3.152(a)(2)(i), F.Cr.P.R., appellant moved to sever each of the four counts of the indictment, which motion was denied. The jury was selected, after which the judge denied the motion for change of venue. A lengthy trial was held, after which the jury returned verdicts of guilty of murder in the first degree of Kelly Ann Dobbert, guilty of murder in the second degree of Ryder Scott Dobbert, guilty of child torture of Ernest John Dobbert, III, and guilty of child abuse of Honore Elizabeth Dobbert. The jury returned an advisory sentence finding that sufficient aggravating circumstances did not exist to justify a sentence of death and that sufficient mitigating circumstances exist to warrant imposition of a life sentence. Motion for new trial was denied and defendant was adjudicated guilty of each of the four counts of which he was found guilty.

The trial court imposed the maximum penalties for the crimes of murder in the second degree, child torture, and child abuse, which sentences are to run consecutively and total forty-six years;[1] and after closely examining

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[1] As explanation for the imposition of consecutive sentences, the trial judge stated: "The sentences imposed in the case above of Murder in the Second Degree, Child Torture and Child Abuse are to be served consecutive with the sentence which the court imposes below for the crime of Murder In The First Degree. Ordinarily it would be a useless act to run sentences for Murder in the Second Degree, Child Torture and Child Abuse consecutive to the maximum sentence for Murder In The First Degree. This is done in this case for the reason that there are now before the Courts legal challenges to the maximum penalty in first degree murder cases. Should such challenges prevail this Court would reimpose the maximum possible

and writing extensive findings as to each of the elements of aggravation and/or mitigation set out by law, the trial judge imposed the sentence of death for the first degree murder. He analyzed each individual mitigating and aggravating factor in detail and gave full explanation for his decision to impose the death penalty. Because of their importance to the decision of this cause, the findings enumerated by the trial judge must be set out herein. Relative to the mitigating circumstance of whether the defendant has no significant history of prior criminal activity, the trial court found as follows:

> "FACT:
>
> That on 9-20-65 the Police of St. Francis, Wisconsin, arrested the defendant for 'Battery—Child', in that he 'struck Ernest John Dobbert, III, age 5 years, several times causing a black eye, a large bruise on the upper forehand and red swollen checks and nose.'
>
> "The Judge of that Court sent the defendant to a Hospital for mental observation and placed him on one year probation.
>
> "FACT:
>
> "That on 11-17-67 the Police of St. Francis, Wisconsin, arrested the defendant on the charge of 'Assault', in that instance the report states that the defendant 'disciplined his son, Ernest John Dobbert, III, for poor grades by burning his hands over an open flame on a gas range.'
>
> "The defendant was found guilty and incomprehensively the Judge of that Court only fined the defendant $50.00 and imposed no further punishment. This was only two years after he had been placed on probation for battery on Little John in 1965.

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sentence for Murder in the First Degree and run the sentences for Murder in the Second Degree, Child Torture and Child Abuse consecutive thereto."

"FACT:

"The evidence and testimony of John III and neighbors at the trial and the defendant's own written statement was that he was constantly beating the children with fists, boards and other objects and was seen kicking, choking and beating Kelly Ann Dobbert, Ryder Scott Dobbert, Ernest John Dobbert, III and Honore Elizabeth Dobbert. The neighbors made their complaints to the Police and Social Welfare Agencies, but the defendant was able to avoid a thorough investigation of the charges by deceit, lies and by the murder of Kelly Ann and Ryder Scott Dobbert.

"CONCLUSION:

"There is no mitigating circumstances under this paragraph because there was a significant history of prior criminal activity towards the children in both Wisconsin and Jacksonville, Florida."

Relative to the mitigating circumstance of whether the murder was committed while defendant was under the influence of extreme mental or emotional disturbance, the trial judge determined:

"FACT:

The defendant did not testify, however, his written statement did indicate that he thought he was under an emotional strain. However, that statement was more of a recitation of torture of the children than the establishment of any emotional strain.

"FACT:

The defendant was examined by two psychiatrists and a psychologist prior to trial and found to be sane and competent at the time of examination and at the time of the time of the crimes. The psychiatrists both stated that at the time of the crime he understood the nature, quality and wrongfulness of his acts, and knew right from wrong and was able to adhere to the right. Neither the psychiatrists or psychologist found or reported that he was under the influence of extreme mental or emotional disturbance at the time of the crimes."

and concluded that there is no mitigating circumstance under this paragraph. The trial judge determined that the mitigating factor of whether the victim was a participant in the defendant's conduct or consented to the act did not exist since "The defendant murdered his own nine year old daughter, Kelly Ann Dobbert by continuous beatings, kicking, hitting with fist and other objects, choking, sewing up her cuts with needle and thread and other torture and depriving her of medical care and finally murdered her, placed her body in a plastic garbage bag and buried her in an unknown and unmarked grave." As to the mitigating circumstance of whether the defendant was an accomplice in the murder committed by another person, the trial judge found:

"FACT:

"The evidence at the trial showed that defendant alone did the murder. It showed that his wife was in jail in Wisconsin and his Mother was also in Wisconsin and that he was the only adult living in the home. The facts also proved that defendant locked the children inside the home during his absence and confined them to the house when he was present with them and that he actively prevented outsiders, by lies, and subterfuge, from entering the home. The only evidence of torture, beatings and murder were those done by the defendant alone."

As to question of whether defendant acted under extreme duress or under the substantial domination of another, the trial court determined:

"FACT:

"No element of duress was ascertained by the psychiatrists as set forth in paragraph B above. There is absolutely no testimony of duress in any degree which would justify the hideous crimes of which he was convicted. If, he suffered duress over the care and welfare of the children, there was help available but he turned away both Police and Family Services Workers before the murder of Kelly Ann and Ryder Scott Dobbert by lies and deception and by pretending all in the home were well and normal.

"FACT:

"There was no evidence that defendant was under substantial domination of another person. His wife was alternately in jail in Jacksonville, and Wisconsin for worthless checks and his mother was also in Wisconsin and he had no other relative in Jacksonville. While his wife was in the City Prison Farm in Jacksonville she caused the police to visit the Dobbert home to see to the welfare of the children because on a visit the defendant told her of the injuries suffered by the children and his punishment of them. Her influence, if any, was for him to look after and protect the children.

"From a reading of the pre-sentence investigation report which is attached hereto as EXHIBIT #1, it appears that his wife was under his domination to do criminal acts (cash worthless checks) for which she was later jailed."

After extensive written evaluation of the testimony of the psychiatrists, and as supported thereby, the trial judge concluded that defendant was mentally competent and able to understand the nature, quality and wrongfulness at the time of the crimes and had average intelligence. The trial court found no mitigating factor in defendant's age; he was a man of mature physical and mental years and of average intelligence. In general, the trial court concluded that there were no mitigating circumstances. The trial judge then proceeded to analyze each of the statutorily enumerated aggravating circumstances as they applied to this cause. In particular, as to the especially heinous, atrocious, and cruel nature of the murder of which defendant has been convicted, the trial court found, as follows:

"FACT:

"The defendant stands convicted of first degree murder of his 9 year old daughter, Kelly Ann Dobbert, second degree murder of his 7 year old son, Ryder Scott Dobbert, torture of his then 11 year old son, Ernest John Dobbert, III, and child abuse of his then 5 year old daughter, Honore Elizabeth Dobbert.

"FACT:

"The evidence and testimony showed premediated and continuous torture, brutality, sadism and unspeakable horrors committed against all of the children over a period of time. The crimes were committed against the children constantly and it is difficult to separate the specific acts against the individual child. What was done to one—short of causing blindness and murder—was done to all. However, the Court has set forth below some of the cruel and brutal acts against Kelly Ann—in so far as trial notes and memory of testimony serve me correctly.

"Over the period of time of the latter portion of Kelly Ann's short, tortuous life the defendant did these things to her on one or many occasions:

1. Beat her in the head until it was swollen.

2. Burned her hands.

3. Poked his fingers in her eyes.

4. Beat her in the abdomen until 'it was swollen like she was pregnant.'

5. Knocked her against a wall and 'when she fell, kicked her in the lower part of the body.'

6. Held her under water in both the bath tub and toilet.

7. Kicked her against a table which cut her head —then defendant sewed up her wound with needle and thread.

8. Scarred her head and body by beating her with a belt and board—causing marks from her cheek, across the neck and down her back—which injuries

> worsened without treatment 'until the body juices came out'.
>
> 9. On one occasion beat her continuously for 45 minutes.
>
> 10. On many occasions kicked her in the stomach with his shoes on, and on the night she died he kicked her a number of times.
>
> 11. Kept her out of school so that the many scars, cuts and bruises on her body would not be seen by others.
>
> 12. Defendant made no effort to get professional medical care and attention for the child and in fact actively prevented any outsiders from discovering her condition.
>
> 13. Choked her on the night she died and when she stopped breathing he placed her body in a plastic garbage bag and buried her in an unmarked and unknown grave."

and found that the aggravating circumstances were sufficient and great to warrant the imposition of the death penalty.

[1] Appellant initially claims reversible error in that the trial court denied his request that instructions on attempts be given pursuant to Rule 3.510, F.Cr.P.R. To this request, the trial judge responded:

> "I will not give those. I don't consider there to be any attempt on a homicide. I am familiar with the rule. I don't really think that it says that you have to do that. I have read it over a number of times. On a homicide you either have a homicide or you don't have a homicide."

Rule 3.510, F.Cr.P.R., provides:

> "Upon an indictment or information upon which the defendant is to be tried for any offense the jurors may convict the defendant of an attempt to commit such offense if such attempt is an offense, or may convict him of any offense which is necessarily included in the offense charged. The court shall charge the jury in this regard."

Relative to instructions as to attempts to commit charged offenses, this Court in *Brown* v. *State*, 206 So.2d 377 (Fla.1968), explained:

> "ATTEMPTS. Under § 919.16, a jury is empowered to convict a defendant of an attempt to commit the offense charged in the accusatory pleading, if such an attempt is itself an offense. Attempts generally are proscribed by § 776.04, supra. In limited situations attempts to commit described acts are defined as separate substantive offenses. For example, Fla. Stat. § 806.04, F.S.A. defines fourth degree arson in terms of an attempt to burn certain property.
>
> "Section 919.16, simply requires that in every case, the trial judge must determine as a matter of law whether an attempt to commit the crime charged would itself constitute an offense under Florida law. If he determines that it does, either under § 776.04, or under a separate statute, then he must instruct the jury on the subject of such attempt, and the jury may find guilt accordingly. In this situation it is immaterial whether the accusatory pleading specifically charges an attempt. Further, the charge must be given, even though, in the opinion of the trial judge, the proofs established guilt of the crime charged rather than a mere attempt to commit it."

Accord: *State* v. *Washington*, 268 So.2d 901 (Fla. 1972), and *Rayner* v. *State*, 273 So.2d 759 (Fla.1973).

Appellee posits that the failure of the trial court to instruct on law of attempt, in the instant case, does not constitute reversible error. Citing this Court's decision in *DeLaine* v. *State*, 262 So.2d 655 (Fla.1972), as authority for its position, appellee submits and we agree that the trial court's noncompliance with *Brown*, supra, and Rule 3.510, F.Cr.P.R., was error but was harmless error. In *DeLaine*, supra, the defendants had been charged, tried and convicted of rape. Therein, this Court found that the trial court erred in refusing to give the requested charge on assault and battery which under the language of *Brown*, supra, constitutes a necessarily included offense; however, this Court in *DeLaine*, supra, applied the harmless error statute, explicitly opining:

> "It is apparent that we have not foreclosed, under appropriate circumstances, the invocation of Fla.Stat. § 924.33, F.S.A., which reads:
>
> > " 'No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.'
>
> "In the case *sub judice*, the trial judge did instruct the jury on the lesser included crime of assault with intent to commit rape, and the jury had before it an opportunity to convict the petitioners thereunder. This the jury did not do, but chose to convict petitioners under the greater charge of rape, obviously because the jury had before it overwhelming evidence of force and repeated penetration with prosecutrix, together with evidence of her utmost resistance. The record and transcript of this trial demonstrates that great force was used upon the prosecutrix and that she was raped repeatedly against her will and that throughout she fought and resisted to the best of her ability.
>
> "We hesitate to invoke the harmless error statute quoted above in a case of this magnitude, but we have determined that the petitioners received a fair trial and justice dictates an affirmance rather than a reversal. As a matter of common sense and logic, if the jury did not convict the petitioners of assault with intent to commit rape, the same jury would not convict them of assault and battery, *which is two steps removed* from the crime of which petitioners were convicted. Under the circumstances of this case, the failure to give the requested charge on assault and battery was harmless error."

Cf. *North* v. *State*, 65 So.2d 77 (Fla.1963), application of harmless error to death cases.

[2] The record, sub judice, shows that the jury was instructed on murder in the first degree, murder in the second degree, murder in the third degree, manslaughter, and justifiable and excusable homicide, and was further instructed:

> "If you return a verdict of guilty, it should be for the highest offense which has been proved beyond a reasonable doubt."

We agree with Justice Drew's rationale in *Spigner* v. *State*, 304 So.2d 496 (Fla.App. 1, 1974), and find its application most appropriate to the instant cause. Therein, he held, in pertinent part, as follows:

> "The record here shows that the trial judge charged the jury on: 1) murder in the second degree; 2) murder in the third degree; and 3) manslaughter, and defined these offenses to the jury with the admonition: 'If you return a verdict of guilty, it should be for the highest offense which has been proven beyond a reasonable doubt.' The conviction of appellant by this jury of the offense of murder in the second degree brings the failure of the trial judge to charge on attempt squarely within the scope of the harmless error statute, and the holding of the Supreme Court in *DeLaine* v. *State*. This Court should not reverse a judgment of conviction unless the error committed 'injuriously affected the substantial rights of the appellant'. The statute contemplates the commission of error by the trial judge, and we think it was error not to charge the jury as requested. The result reached by the jury, however, in finding the appellant guilty of murder in the second degree when it was empowered to find him guilty of two lesser offenses, presents the exact situation meant to be covered by the statute. The error

> clearly did not injuriously affect the substantial rights of appellant."

The trial judge did not commit reversible error in failing to instruct on attempt.

[3] Relative to appellant's argument that the trial court erred in not allowing a change of venue, we find from the record that the trial judge did everything possible to insure an impartial trial for the defendant. The jurors, carefully and extensively examined by defense counsel to determine that they could be fair and impartial, were sequestered and comprehensive gag order was placed on all participants of the trial. As further evidenced by the record, seventy-eight prospective jurors were interviewed; allowed thirty-two peremptory challenges, the defense only exercised twenty-seven. Upon the selection of twelve persons, the trial judge denied the motion for change of venue with the following analysis:

> "Both the State and the defendant have challenges left. We have selected the jury.
>
> "Most times the jurors have heard about the case in some fashion from the media. However, a number of them did not hear about it. Some of them that did not hear about it are on the jury. Some are not.
>
> "As I said those that were selected, in the main, if I recall correctly, at least I was satisfied. I'm sure counsel for both sides have different ideas. I'm satisfied some of them had no opinions. If they had opinions they said that it would not affect their decisions. Some had impressions about the nature of the case. So I deny the motion for a change of venue."

Appellant has failed to show that he did not receive a fair and impartial trial, that the setting of his trial was inherently prejudicial. Cf. *Murphy* v. *Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) opinion filed June 16, 1975. The trial judge did not abuse his discretion in denying the motion for change of venue. Most recently in *Murphy* v. *Florida*, supra, the Supreme Court of the United States enunciated:

> "The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent" jurors.' *Irvin* v. *Dowd*, supra, 366 U.S. at 722, 81 S.Ct. [1639], at 1642, 6 L.Ed.2d 751. Qualified jurors need not, however, be totally ignorant of the facts and issues involved.
>
>> "'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' *Id.*, at 723, 81 S.Ct. [1639] at 1642.
>
> "At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' Ibid.
>
> "The *voir dire* in this case indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside. Some of the jurors had a vague recollection of the robbery with which petitioner was charged and each had some knowledge of petitioner's past crimes, but none betrayed any belief in the relevance of petitioner's past to the present case. Indeed, four of the six jurors volunteered their views of its irrelevance, and one suggested that pepole who have been in trouble before are too often singled out for suspicion of each new crime—a predisposition that could only operate in petitioner's favor." 421 U.S. at 800, 95 S.Ct. at 2036 (footnotes omitted).

Cf. *Hawkins* v. *State*, 206 So.2d 5 (Fla.1968).

Appellant raises several other points on appeal, none of which we find meritorious so as to constitute reversible error.

We have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed and we have also, pursuant to Rule 6.16(b), Florida Appellate Rules, reviewed the evidence to determine whether the interests of justice require a new trial, with the result that we find no reversible error is made to appear and the evidence in the record, sub judice, does not reveal that the ends of justice require that a new trial be awarded.

[4] Upon considering all the mitigating and aggravating circumstances and upon careful review of the entire record in the cause, the trial court properly imposed the death penalty for the murder conviction. The trial judge stated in the conclusion of his sentencing statement:

> "I am not easily shocked or affected by tragedy or cruelty—but this murder of a helpless defenseless and innocent child is the most cruel, atrocious, and heinous crime I have every [sic] personally known of—and it is deserving of no sentence but death."

We agree.

Accordingly, no reversible error appearing, the judgments and sentences of the Circuit Court appealed from are hereby affirmed.

It is so ordered.

ADKINS, C. J., ROBERTS, J., and KLEIN, Circuit Judge, concur.

BOYD, J., dissents with an opinion.

OVERTON, J., concurs specially with an opinion.

ENGLAND, J., concurs in part and dissents in part with an opinion.

BOYD, Justice (dissenting).

I Dissent.

This cause is before us on direct appeal[2] from the Circuit Court of Duval County which entered a conviction of first degree murder based on a jury verdict, thereafter sentencing Appellant to death by electrocution. Although we are not here reviewing these additional matters, Appellant was simultaneously convicted of both second degree murder of his small son and child abuse in connection with the torturing of two of his other children, which led to the almost total blindness of his eldest son who was approximately thirteen years of age at the time of the murder being considered.

The only eyewitness to the murder was Appellant's son, John Dobbert, mentioned above, whose eyesight was twenty over two hundred (20/200). John testified that his father had brutally beaten his daughter Kelly Ann and, subsequently, had choked her; whereupon Appellant called John into the room to determine whether Kelly Ann had actually died. John testified that there were no signs of life and that it was his opinion that his sister was dead. Thereafter, Appellant dressed his daughter in her finest clothing, kept her lying on the bed for approximately two hours, placed her in a plastic bar and carried her to the attic. John testified that he did not see the body of his sister again and that he knew nothing of what was done with her body thereafter. There was inconsequential testimony that experts found some material in the attic which possibly could have been human blood, but this was not clearly established. The Appellant made rambling remarks concerning the possible whereabouts of his two dead children but never clearly admitted murder.

On appeal, Appellant relies in part upon the alleged error of the trial court in refusing to instruct the jury on certain lesser included offenses[3] and argues that the

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[2] Article V, Section 3(b)(1), Florida Constitution.

[3] Instructions were requested by Appellant on assault and battery, § 784.03, F.S. (1973); aggravated assault, § 784.04, F.S. (1973); and aggravated battery, § 784.045, F.S. (1973), as lesser included offenses to the charges of first degree murder.

Judge also erred when he refused to instruct the jury that they were authorized to convict the Appellant of attempted murder.[4] Rule 3.510, Rules of Criminal Procedure, provides that whenever a person is tried for a crime and the criminal statutes provide that an attempt to commit such a crime is also a crime, it is mandatory that the court instruct the jury that it is entitled to find the accused person guilty of an attempt to commit the crime in the same manner as the jury is entitled to find the defendant guilty of a lesser included offense.[5]

In this case the Appellant, through his attorney, moved the court not only to charge on the lesser included offenses but also specifically to charge on attempted murder.

This Court in *Hand* v. *State*,[6] held that defendants, upon request, were entitled to a charge on larceny when charged with robbery. In *Brown* v. *State*,[7] this Court held it was mandatory not only to instruct on necessarily included offenses if requested to do so but also to instruct on attempts to commit the crime charged if such attempts constituted crimes. In *State* v. *Washington*,[8] and in *Rayner* v. *State*,[9] this Court held it was reversible error not to instruct on lesser included offenses even though a defendant requested the court not to give them.

In *Lewis* v. *State*[10] the District Court of Appeal, Fourth District, held that failure to charge on attempt to receive stolen property when the defendant was charged with receiving stolen property was reversible error. In *Herman* v. *State*[11] that same court held it reversible error not to instruct on lesser included offenses of manslaughter and aggravated assault when requested by defendant. In *Ward* v. *State*,[12] the Fourth District ruled that failure to charge on attempts to commit the crime charged, when such attempts are crimes, constitutes error in a case where defendant was charged with breaking and entering. In *Elmore* v. *State*[13] the defendant was tried for murder and convicted of manslaughter; the Fourth District reversed the conviction for failure of the trial judge to instruct the jury on aggravated assault as requested by the defendant. In *Levi* v. *State*[14] that District held that failure to instruct the jury that it could find defendant guilty of attempting to deal in credit cards belonging to another when charged with dealing with credit cards of another was reversible error. In *Bracy* v. *State*[15] the Fourth District decided that failure of the trial court to instruct on attempted murder, attempted robbery, and assault with intent to commit murder was reversible error, although the judge

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[4] Section 776.04, Florida Statutes, states in pertinent part:

> "Whoever attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such an offense, but fails in the perpetration, or is intercepted or prevented in the execution of the same, shall, when no express provision is made by law for the punishment of such attempt, be punished as follows:
>
> (1) If the offense attempted is a capital or life felony, the person convicted shall be guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084."

(This seems to indicate that attempts generally contemplate attempts to commit capital crimes such as first degree murder.)

[5] Rule 3.510. *Conviction of Attempt; Lesser Included Offense*

> "Upon an indictment or information upon which the defendant is to be tried for any offense the jurors may convict the defendant of an attempt to commit such offense if such attempt is an offense, or may convict him of any offense which is necessarily included in the offense charged. The court shall charge the jury in this regard."

[6] 199 So.2d 100 (Fla. 1967).

[7] 206 So.2d 377 (Fla. 1968).

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[8] 268 So.2d 901 (Fla. 1972).

[9] 273 So.2d 759 (Fla. 1973).

[10] 269 So.2d 692 (Fla. App. 1972).

[11] 275 So.2d 264 (Fla. App. 1973), *cert. den.*, 279 So.2d 308.

[12] 287 So.2d 138 (Fla. App. 1973); see also *Clements* v. *State*, 284 So.2d 700 (Fla. App. 1973), *cert. den.*, 294 So.2d 654.

[13] 291 So.2d 617 (Fla. App. 1974).

[14] 297 So.2d 617 (Fla. App. 1974).

[15] 299 So.2d 126 (Fla. App. 1974).

believed evidence clearly established murder; it was also held that a failure by the trial judge to give a requested instruction on the lesser included offense of assault with intent to commit robbery was reversible error.

The above holdings become acutely important with respect to any case in which the body of the alleged victim cannot be found. In this particular cause, the testimony of the victim's brother John was that the Appellant had severely beaten her and was choking her shortly before he decided that she was dead. Testimony in the record justified the jury in finding the Appellant guilty of murder in the first degree, and my observations herein should not be construed otherwise. Since the body of the deceased could not be found, however, the jury should have been instructed not only on lesser included offenses established by the testimony of the victim's brother John, but it should have been instructed also on attempted murder. It is remotely possible that the Appellant attempted to murder his daughter and that after removing her from the bed to the attic, considering her dead, she might have become conscious and fled. I make no such finding here, but since the statutes and rules of court require instruction on attempted murder, this appears to be a prime case in which the jury should have been instructed that, in its discretion, it could have found the Appellant guilty of attempted murder instead of murder. Human life is too precious to have an individual executed without being afforded all of the safeguards provided by the Constitutions, statutes and rules of court. While we have considered Florida's harmless error statute,[16] we feel that it is not applicable in this case, as the error was too great to be considered harmless.

The Appellant also argues that he was denied a fair trial by the court's failure to grant his motion for change of venue. Evidence in the record clearly shows that the cruelty and torture administered by the Appellant to his children became a subject of great interest among the people of the Greater Jacksonville, Florida, area at the time his crimes were made known by the news media. Further, it is apparent that the news media constantly continued to report the gruesome details of the case as they developed. An unusually high percentage of persons called as prospective jurors first informed the court that they were familiar with the case through the news media, and some of them even stated that they had opinions that the Appellant was guilty as charged but that they could remove such prejudice from their minds and could make an objective determination of his guilt or innocence.

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[16] Section 924.33, Florida Statutes.

The Constitutions of the United States and Florida permit the news media to write extensively about crime and criminals and to discuss the gory details of crime before and during trials. This is a constitutional right that I recognize and respect; however, other constitutional provisions grant persons charged with crime the right to be tried fairly, under due process of law, in an atmosphere of fairness and without prejudice in the minds of the jury. Rarely in the history of Florida has any crime created greater public attention than the activities of the Appellant in the treatment of his children, culminating in two convictions of murder and two convictions of child abuse. It is my opinion that the court should have granted the motion for change of venue in order that the Appellant might be tried in some part of Florida in which the magnitude of his crimes was not so widely known and so freely discussed among the populace.

I have considered other points raised by the Appellant and deem them to be without substantive merit. I feel that the court committed reversible error in not charging the jury that it was authorized by law to find the Appellant guilty of attempted murder or the lesser included offenses of aggravated assault, aggravated battery, and assault and battery. Also, I feel that the court committed reversible error in denying Appellant's motion for change of venue. For the foregoing reasons I would quash the judgment of the trial court and remand the cause for a new trial at a location substantially away from the City of Jacksonville.

I therefore dissent.

OVERTON, Justice (concurring specially).

I concur in the majority opinion including the sentence of death. In my opinion, the facts in the record together with the explicit findings by the trial judge meet the test set forth in *Tedder* v. *State*, 332 So.2d 908 (Fla. 1975), Opinion filed November 19, 1975, concerning a sentence of death after a jury recommendation of life imprisonment.

ENGLAND, Justice (concurring in part and dissenting in part):

I fully agree with all aspects of the Court's opinion through its conclusion that the evidence "does not reveal that the ends of justice require that a new trial be awarded." I dissent from that part of the decision which upholds the trial judge's imposition of a death penalty.

In *Tedder* v. *State*, 332 So.2d 908, opinion filed November 19, 1975, we articulated a sensible standard for reviewing the conflicting sentences of juries and judges in death penalty cases. We there said:

> "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

Applying that standard here, I would hold that reasonable persons could disagree with the trial judge,* and that the jury's recommendation of life imprisonment should be adopted.

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* As the majority observes, by imposing and discussing the basis for consecutive sentences the trial judge anticipated the possibility that reasonable people could differ with him.

IN THE SUPREME COURT OF FLORIDA

Case No. 45,558

ERNEST JOHN DOBBERT, JR., APPELLANT

vs.

STATE OF FLORIDA, APPELLEE

PETITION FOR REHEARING

Comes now the Appellant, by and through his undersigned attorney, pursuant to Florida Appellate Rules 3.14 and 6.17, and moves this Honorable Court to grant a rehearing in this cause. In support thereof, Appellant would show the following:

1. The opinion of this Honorable Court, in the case *sub judice*, once again failed to follow the constitutional dictates of *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 246 (1972). In *Alvord* v. *State*, 322 So. 2d 533, (Fla. 1975), this Court said at page 540:

> ". . . Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case. . ."

The imposition of the death penalty under our statute, as described above, does nothing more than foster confusion, arbitrariness, unbridled and uncontrolled discretion and inequality of results so strongly proscribed in *Furman, supra.*

2. The opinion of this Honorable Court fails to recognize that the aggravating and mitigating circumstances, enumerated in Florida Statute, Section 921.141, under which criteria the death penalty may or may not be imposed, are nothing more than unspecific, general and non-

exclusive standards which are easily manipulated to suit the particular leanings of the decision maker, whether it be jury, trial judge or this Honorable Court, and accordingly, these standards are arbitrary, capricious and wholly at variance with the rationale of *Furman, supra.* Furthermore, to give and take away life at various stages of the trial depending upon how these standards are interpreted by the jury, trial judge or this Honorable Court under our triune system is in and of itself cruel and unusual punishment.

3. The trial court and this Honorable Court ignored the jury's advisory sentence, signed by ten of its twelve members, finding that there were not sufficient aggravating circumstances to justify a sentence of death and that there were sufficient mitigating circumstances to justify the sentence of life imprisonment (Record—page 113). In *Tedder* v. *State*, 322 So. 2d 908, (Fla. 1975), this Court said at page 910:

> ". . . A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually *no reasonable person could differ* . . ." (emphasis ours).

Are we to conclude from the decision in the case at bar that only a simple majority of appellate judges are to be considered reasonable persons and that ten jurors, who saw and heard all the testimony and evidence, are unreasonable persons within the language articulated by this Honorable Court in *Tedder, supra?* In the case at bar, Petitioner urges that the facts suggesting a sentence of death were not so clear and convincing that virtually no reasonable person could differ, but to the contrary, the facts suggested a sentence of life imprisonment to ten reasonable persons—the ten jurors who signed the advisory sentence. In a criminal case, should not the differences of reasonable persons be resolved favorable to the defendant, especially when ten of those who differ are jurors, who more truly reflect the conscience of the community?

4. Appellant seeks a rehearing on the issue of the applicability of the new death penalty sentencing procedure insofar as this Honorable Court relied on the holding in *Lee* v. *State*, 294 So. 2d 305 (Fla. 1974). Appellant would suggest that the holding of *Lee* was misstated by Appellee and perhaps this court relied on that misstatement (see Appellee's brief at pages 93 and 94 wherein Appellee concludes that *Lee* stands for the proposition that "there is no ex post facto ban" to the new death penalty sentencing provisions).

To the contrary, the holding in *Lee, supra* was stated by this Honorable Court at the conclusion of the passage cited by Appellee as follows:

> ". . . *Since this is not the case*, that portion of the District Court's opinion dealing with which law is applicable for the imposition of sentence, Fla. Stat., Sec. 775.082, F.S.A., as amended by Chapter 72-724, *must be reversed with instructions to apply the penalty provision in effect at the time of the commission of the offense.*" (emphasis ours). *Id.* at 307.

Apparently, Appellee missed the importance of this final sentence. *Lee* held that the change in the law *did* affect the penalty and *did* expose *Lee* to a greater penalty and thus required application of the old law.

However, even if Appellee's reading of *Lee* is correct, *Lee* and the case *sub judice* are distinguishable. In *State* v. *Lee*, 286 So. 2d 596 (1st D.C.A., Fla. 1973), Judge Spector, finding no ex post facto principles applicable to Section 921.141, Florida Statutes, F.S.A., cited *Rooney* v. *State of North Dakota* at page 599:

> ". . . It did not create a new offense, nor aggravate or increase the enormity of the crime . . . nor require the infliction upon the accused of any *greater or more severe punishment than was prescribed by law at the time of the commission of the offense.*" (emphasis ours).

And citing Wharton's Criminal Law Procedure, Vol. 1, Sec. 20, Judge Spector continued:

> "Changes in the method of carrying out the sentence or the form of execution are not deemed prohibited as an ex posto law *when they do not in substance operate to the detriment of the defendant.*"
>
> * * * *
>
> " 'For example, a statute providing a new method of inflicting the death penalty is not an ex post facto law *as to persons already sentenced to death* when the (new) statute gives the defendant the choice of methods.'
>
> Citing *Wetzel* v. *Wiggins*, 226 Miss. 671, 85 So. 2d 469, *cert. den.* and appl. dismd. 352 U.S. 807, 77 S.Ct. 80, 1 L.Ed. 2d 39." (emphasis ours).

Judge Spector was dealing with a defendant who had already been sentenced to death. The changed law could in no way *increase his penalty.* The only question was to determine which method would be used in the *de novo* sentencing proceeding. *Lee* could not receive any greater penalty under the new procedure than he received under the old.

On the other hand, Appellant, under the old law, would have received a mandatory sentence of life (10 jurors voted for life imprisonment). Under the new law, Appellant clearly lost the mandatory life sentence and was subjected to the added element of judicial discretion which, as it was in fact applied, resulted in the imposition of the greater penalty of death.

The new statute has, in fact, greatly increased Appellant's penalty and has operated against him to his detriment, thus meeting the criteria for a violation of the ex post facto principle.

5. This Honorable Court erred in the case *sub judice* when it ruled that it was harmless error for the trial court not to instruct on attempted murder under the rationale of *De Laine* v. *State*, 262 So. 2d 655 (Fla. 1972) and *Spigner* v. *State*, 304 So. 2d 496 (Fla. App. 1, 1974). Petitioner submits that both cases cited in this court's opinion are readily distinguishable from the case at bar. In *De Laine*, an instruction on attempt was not in issue, and in *Spigner*, the facts were not susceptible to the conclusion that perhaps there had been no homicide. To rely upon the doctrine of harmless error, in the case at bar, when the facts are so uniquely applicable to warrant an instruction on attempted murder is to arbitrarily deny Appellant his constitutional right of equal protection of the law. The fact that Appellant was subsequently convicted of murder does not justify the trial court's refusal to charge on attempt and thereby preclude defense counsel's argument and the jury's consideration of this important issue.

WHEREFORE, Appellant requests this Honorable Court to grant a rehearing in this case and to vacate Appellant's conviction and sentence of death.

Respectfully submitted,

/s/ Louis O. Frost, Jr.
Louis O. Frost, Jr.
Public Defender
Fourth Judicial Circuit
221 Duval County Courthouse
Jacksonville, Florida 32202
Attorney for Appellant

[Certificate of Service Omitted in Printing]

IN THE SUPREME COURT OF FLORIDA

Case No. 45,558

ERNEST JOHN DOBBERT, JR., APPELLANT

vs.

STATE OF FLORIDA, APPELLEE

MOTION FOR LEAVE TO AMEND PETITION FOR REHEARING

Comes now the Appellant, Ernest John Dobbert, Jr., by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, and moves this Honorable Court for leave to amend Paragraph 5 of his Petition for Rehearing filed in this cause on January 29, 1976, by adding the additional language as follows:

5. . . . Further, the opinion of this Honorable Court should now be controlled by this Court's subsequent opinion in *State of Florida* v. *Gwendolyn Terry*, Case No. 46,370, filed February 25, 1976, quashing the District Court's opinion. In that case this Court held that the refusal of the trial court to instruct the jury on necessarily included lesser offenses was, in fact, *prejudicial* and *reversible* error and further held that:

> "*Any prior appellate decisions* conflicting with the principles announced herein are expressly overruled." (Emphasis ours)

If, as this Court so aptly holds in *Terry*, refusal to instruct on an applicable lesser included offense, regardless of a subsequent conviction for a higher offense, is prejudicial error; then it is incumbent upon this Honorable Court to hold that refusal to instruct on attempted murder, which was required as a matter of law and so apropos to the unique facts of the case *sub judice*, was likewise prejudicial and reversible error.

In Support Thereof, Appellant would urge this Court to follow the dictates of *Terry*, *supra*, which opinion was not filed when this Honorable Court rendered its opinion in the case *sub judice*. The conviction in the case at bar should not be affirmed on the basis of harmless error when a subsequent decision of this Court conflicts with the principles announced therein.

WHEREFORE, Appellant respectfully requests this Honorable Court to grant his Motion for Leave to Amend his Petition for Rehearing previously filed herein by entering an appropriate order incorporating and making a part thereof the requested addition to Paragraph 5 set forth in this Motion.

Respectfully submitted,

/s/ Louis O. Frost, Jr.
LOUIS O. FROST, JR.
Public Defender
Fourth Judicial Circuit
221 Duval County Courthouse
Jacksonville, Florida 32202
Attorney for Appellant

[Certificate of Service Omitted in Printing]

IN THE SUPREME COURT OF FLORIDA

January Term, 1976

Monday, April 5, 1976

Case No. 45,558

ERNEST JOHN DOBBERT, JR., APPELLANT

vs.

STATE OF FLORIDA, APPELLEE

On consideration of the Petition for Rehearing and amendment thereto filed by appellant and Response,

IT IS ORDERED that said petition is denied.

OVERTON, C.J., ROBERTS, ADKINS AND ENGLAND, J.J., AND KLEIN, CIRCUIT JUDGE, CONCUR

BOYD, J., DISSENTS

A True Copy

TEST:

/s/ Sid J. White
SID J. WHITE
Clerk Supreme Court

IN THE SUPREME COURT OF FLORIDA

Case No. 44,991

ERNEST JOHN DOBBERT, JR., APPLICANT

v.

STATE OF FLORIDA, RESPONDENT

APPLICATION FOR CONSTITUTIONAL STAY OF TRIAL

The Applicant, John Ernest Dobbert, Jr., by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, respectfully presents this application pursuant to Florida Appellate Rule 4.5 (g) and moves this Honorable Court to enter its order staying trial in this cause.

The Applicant, John Ernest Dobbert, Jr., seeks this extraordinary order upon the following reasons:

STATEMENT OF FACTS

1. That on December 27, 1973, the Applicant was charged by Indictment. Counts One and Two charged the offense of murder contrary to Florida Statute section 782.04, alleging that these offenses were committed on December 31, 1971, in Count One and between January 1, 1972, and April 8, 1972, in Count Two. Counts Three and Four alleged child torture. (Appendix A.)

2. That on January 14, 1974, the Applicant filed a Motion to Dismiss alleging *inter alia* that Counts One and Two of the Indictment should be dismissed because the bare allegation of a violation of Florida Statute section 782.04 did not adequately inform the Applicant of the offenses or the possible penalty. (Appendix B.)

3. That on January 15, 1974, the Applicant filed a Motion requesting the trial court to specify the manner of trial, the number of trial jurors, and the penalties applicable to Counts One and Two of the Indictment. (Appendix C.)

4. That on January 30, 1974, the Applicant filed a Motion for Continuance (Appendix D) requesting the trial court to stay the trial in this cause until this Court renders its opinion in the pending case of *Lee* v. *State*, cert. granted January 24, 1974.

5. That on February 6, 1974, orally and in open court, the trial court dismissed Counts Three and Four of the Indictment, pursuant to the Applicant's Motion to Dismiss, on the ground that the Indictment violated the statute of limitations applicable to the offenses of child torture and ruled that, under his conception of the opinion of the First District Court of Appeal in *State* v. *Lee*, 286 So. 2d 596 (1st DCA Fla. November 27, 1973), Fla. Sup. Ct. cert. granted, January 24, 1974, this was a capital offense and that the maximum sentence applicable was death.

6. That, also on February 6, 1974, the trial court denied the Applicant's Motion for Continuance that requested stay of trial pending this Court's decision in *Lee* v. *State*, *supra*.

JURISDICTION

7. That Florida Appellate Rule 4.5(g) articulates the authority of this Supreme Court of Florida to issue a constitutional writ in extraordinary situations.

8. That this cause, if conviction is obtained in circuit court, would be reviewable on direct appeal to this Supreme Court of Florida.

9. That this stay applied for by the Applicant is limited solely to the actual trial of this cause.

10. That the Applicant is now and will remain in custody in the Duval County Jail under no bond and hereby announces his willingness to waive the Speedy Trial Rule.

11. That this application is presented in manifest good faith and is not for the purposes of delay.

12. That, as mandated in *Couse* v. *Canal Authority*, 209 So. 2d 865 (Fla. 1968), this Court has jurisdiction under the "all writs" provision of our constitution (FLA. CONST. art. V, section 3(b)(4)) in all cases which are within its appellate jurisdiction. This Court has supervisory jurisdiction pursuant to Article V of the Florida Constitution over all courts so that the laws of our State may be properly executed.

13. That the trial court in this cause has denied the Applicant's motions which seek this remedy and has announced its intention to set this case for trial for either March 11 or March 18, 1974.

IRREPARABLE INJURY

14. That, if this court fails to exercise its supervisory constitutional power, the Applicant will suffer irreparable injury in the trial court.

15. Irreparable injury will occur because:

> The Applicant is charged with commission of a murder on December 31, 1971, and with commission of a second murder at some time between January 1, 1972, and April 8, 1972. At the time these offenses were allegedly committed, Florida law for murder in the first degree provided for a death penalty unless the jury recommended mercy. FLA. STAT. 782.04, 775.082 (1971). That on July 17, 1972, pursuant to the United States Supreme Court decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), this Court held the Florida death penalty provisions inoperative. *Donaldson* v. *Sack*, 265 So. 2d 499 (Fla. 1972).
>
> Following *Donaldson* v. *Sack*, this Court in *Anderson* v. *State*, 267 So. 2d 8 (Fla. 1972), and in *In re Baker* 267, So. 2d 331 (Fla. 1972), commuted all death sentences previously imposed to life imprisonment. On December 8, 1972, the Governor of our State of Florida signed into law Chapter 72-724, Laws of Florida (1972), which reinstated capital punishment in this State. This law was upheld on July 26, 1973, in *State* v. *Dixon*, 283 So. 2d 1 (Fla. 1973).
>
> Until the decision of the District Court of Appeal, First District, in *State* v. *Lee*, *supra*, trials under the old Florida murder statute were conducted as

non-capital offenses. In *State* v. *Lee*, the district court held that the penalty provisions of the new Florida murder statute were procedural and not sbustantive and, thus, a conviction while proceeding under the old murder statue was susceptible to the new provisions for capital punishment. Lee was convicted after trial by jury and sentenced to death prior to this Court's decision in *Donaldson* v. *Sack*, *supra*. Following the United States Supreme Court's opinion in *Furman* v. *Georgia*, *supra*, the trial court commuted Lee's sentence and imposed the sentence of life imprisonment. The State of Florida appealed and the District Court of Appeal remanded that cause for resentencing under Florida Statute 921.141 (1973), holding that the later valid enactment of the death penalty would apply to Lee. The District Court of Appeal denied rehearing on January 7, 1974, but certified that question to this Supreme Court of Florida. Oral argument, following the submission of written briefs by the parties, is scheduled for March 14, 1974. The trial court in this cause was denied the Applicant's motions requesting stay of trial (and only trial) until the question of penalty, as represented by *State* v. *Lee*, is finally disposed. Pursuant to Florida Appellate Rule 4.5(c)(6), the decision of the District Court of Appeal in *State* v. *Lee* is not mandated, and thus not final and not law.

The trial court has ruled that the Applicant is susceptible to the penalty of death in Counts One and Two of the Indictment, which charge the offense of murder under the old Florida murder statute. It is impossible for Applicant's counsel to adequately advise him of his rights and possible liabilities until the *Lee* case is finalized. There clearly will be different advice from attorney to client in any cause where the death penalty is a possibility as opposed to a cause where even conviction of the highest offense will not expose the defendant to loss of his life, the ultimate punishment.

As the decision in *State* v. *Lee* now stands, serious constitutional questions arise concerning the denomination of this cause as capital.

First, the possible imposition of a death penalty appears to violate the prohibition against ex post facto laws. Fla. Const. art. I, section 10; U.S. Const. art. I, section 9(3); amend. XIV. Application of the death penalty would provide a sanction held inoperative as respects the old Florida murder statute under which the Applicant is charged.

Second, the possibility of imposition of the death penalty appears to deny the equal protection and due process of the laws guaranteed to the Applicant. Fla. Const. art. I, 9; U.S. Const. amends V, XIV. If this trial had occurred prior to the decision in *State* v. *Lee*, the prosecution would have proceeded as a non-capital offense.

Third, the possibility of capital punishment would also appear to violate equal protection and due process since, if the Applicant had been tried at the time the alleged offenses took place, his possible death sentence would have been commuted to life imprisonment under *Anderson* v. *State* and *In re Baker*, *supra*.

16. That the prosecution of this cause will not be injured nor will the State of Florida suffer irreparable injury if trial is stayed until this Court's determination of the certified question in *State* v. *Lee*, *supra*.

WHEREFORE, the Applicant, John Ernest Dobbert, Jr., prays this Honorable Court to issue its order to stay the trial, and solely the trial, in this cause until a final determination has been made in *Lee* v. *State*, a determination which appears dispositive of the Applicant's contentions. The Applicant further prays that if this Court should determine that Applicant seeks an improper remedy this Honorable Court, pursuant to Florida Constitution Article V, section 2(a), will consider this application in the proper light and provide the appropriate remedy for this application.

Dated this 8th day of February, 1974.

Respectfully submitted,

LOUIS O. FROST, JR.
Public Defender

/s/ James O. Brecher
JAMES O. BRECHER
Assistant Public Defender
Fourth Judicial Circuit
Duval County Courthouse
Jacksonville, Florida
Attorney for Applicant

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST., art. I, Section 10, provides:

> "No state shall enter into any Treaty Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin and Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

U.S. CONST., amend. XIV, Section 1, provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FLA. CONST., art. I, Section 10, provides:

> "Prohibited laws.—No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."

FLA. CONST., art. X, Section 9, provides:

> "Repeal of criminal statutes.—Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed."

FLA. STAT., Section 921.141 (1971) provides:

> "Recommendation to mercy.—A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by a majority of the jury. When the verdict includes a recommendation to mercy by a majority of the jury, the court shall sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death on a plea of guilty or

when a jury is waived shall be sentenced by the court to death or life imprisonment."

FLA. STAT., Section 775.082 (1971) provides:

> "Penalties for felonies and misdemeanors.—(1) A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, and the discretion of the court."

FLA. STAT., Section 775.082 (1972 Supp.) provides:

> "Penalties for felonies and misdemeanors.—(1) A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, in the discretion of the court.
>
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person who has been convicted of a capital felony shall be punished by life imprisonment.
>
> (3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment with no eligibility for parole."

FLA. STAT., Section 775.082 (1973) provides:

> "Penalties for felonies and misdemeanors.—(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedures set forth in Sections 921.141 result in findings by the court, that such person shall be punished by death, and in the latter event, such person shall be punished by death.
>
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).
>
> (3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1)."

Ch. 72-724, Laws of Florida (1972).

FLA. STAT., Section 921.141 (1973).

CHAPTER 72-724

House Bill No. 1-A

AN ACT relating to capital punishment; amending § 775.081(1), Florida Statutes, providing for a life felony; amending § 775.082, Florida Statutes, as amended by chapter 72-118, Laws of Florida, to provide punishment for capital and life felonies; amending § 782.04, Florida Statutes, to specify the crimes constituting murder and the penalties; amending § 779.07, Florida Statutes, to make intentional injury to property a life felony; amending § 790.16, Florida Statutes, providing for new penalties for throwing or discharging bombs or discharging machine guns in public places; repealing subsections (3) and (4) of § 790.16, Florida Statutes, relating to recommendation of mercy and judicial discretion in sentencing; amending § 790.161, Florida Statutes; providing new penalties for throwing, placing, or discharging any destructive device, depending on degree of harm inflicted; amending § 794.01, Florida Statutes, providing new penalties for crimes of rape; amending § 805.02, Florida Statutes, providing that kidnapping for ransom shall be a life felony; amending § 921.141, Florida Statutes, as amended by chapter 72-72, Laws of Florida, providing a separate proceeding to determine sentence in capital cases; providing a severability clause; providing an effective date.

Be It Enacted by the Legislature of the State of Florida;

Section 1. Subsection (1) of section 775.081, Florida Statutes, is amended to read:

775.081 Classifications of felonies and misdemeanors.—

(1) Felonies are classified, for the purpose of sentence and for any other purpose specifically provided by statute, into the following categories:

(a) Capital felony;

(b) Life felony;

(c) Felony of the first degree;

(d) Felony of the second degree; and

(e) Felony of the third degree.

A capital felony *and a life felony* must be so designated by statute. *Other felonies are* of the particular degree designated by statute. Any crime declared by statute to be a felony without specification of degree is of the third degree, except that this provision shall not affect felonies punishable by life imprisonment for the first offense.

COMMENT: Provides a new category of felony to serve as an additional deterrent to those crimes, while not classified capital, are especially serious in nature.

Section 2. Section 775.082, Florida Statutes, as amended by chapter 72-118, Laws of Florida, is amended to read:

775.092. Penalties for felonies and misdemeanors.—

(1) A person who has been convicted of a capital felony shall be punished by *life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by* death, *and in the latter event such person shall be punished by death.*

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment *as provided in subsection (1).*

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment *as provided in subsection (1).*

Section 9. Section 921.141, Florida Statutes, as amended by chapter 72-72, Laws of Florida, is amended to read:

(Substantial rewording of section. See section 921.141, F.S., as amended by chapter 72-72, Laws of Florida, for present text.)

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) Upon conviction or adjudication of guilt of a defendant or a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury empaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; and further provided that this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh aggravating circumstances found to exist, and

(c) Based on these considerations whether the defendant should be sentenced to life or death.

(3) Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its

findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings.

(4) If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(5) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Supreme Court.

(6) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment;

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

(c) The defendant knowingly created a great risk of death to many persons;

(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or any attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(f) The capital felony was committed for pecuniary gain;

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

(7) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) The victim was a participant in the defendant's conduct or consented to the act;

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(e) The defendant acted under extreme duress or under the substantial domination of another person;

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(g) The age of the defendant at the time of the crime.

Section 10. It is declared to be the legislative intent that if any section, subsection, paragraph, sentence, clause, provision or word of this act is held to be invalid, the remainder of the act shall not be affected.

Section 11. This act shall take effect upon becoming a law.

Approved by the Governor December 8, 1972.

Filed in Office of Secretary of State December 8, 1972.

CHAPTER 921

SENTENCE

921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury empaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstance found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life * [imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES. — Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

SUPREME COURT OF THE UNITED STATES

No. 76-5306

ERNEST JOHN DOBBERT, JR., PETITIONER

v.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Florida.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 8, 1976

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 225646 33

FILED
SEP 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 76-5306

ERNEST JOHN DOBBERT, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT L. SHEVIN
Attorney General

CHARLES W. MUSGROVE
Assistant Attorney General

THE CAPITOL
Tallahassee, FL 32304

COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 76-5306

ERNEST JOHN DOBBERT, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion below is adequately set out in the Petition.

JURISDICTION

For the reasons set out in this brief, Respondent submits that there is no substantial federal question in this case, so that this Court is without jurisdiction.

QUESTION PRESENTED

I. WHETHER THE IMPOSITION OF THE DEATH PENALTY AS TO THIS PETITIONER, PURSUANT TO A FLORIDA STATUTE PASSED SUBSEQUENTLY TO THE DATE OF THE ALLEGED OFFENSE FOR WHICH THE PETITIONER WAS CONVICTED, WAS A VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS AND A DENIAL OF EQUAL PROTECTION OF THE LAWS.

II. WHETHER THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE PETITIONER'S TRIAL SHOWS INHERENT PREJUDICE IN THE PRE-TRIAL SETTING AND JURY SELECTION PROCESS TO THE EXTENT THAT THE PETITIONER WAS DENIED DUE PROCESS OF LAW.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are adequately set out in the Petition.

STATEMENT OF THE CASE AND FACTS

Respondent cannot agree that there were three dissenting opinions. Justice Overton concurred in both the judgment and sentence (328 So.2d at 444).

Respondent would augment Petitioner's factual recitation by reference to the facts found by the trial Judge:

> "'The evidence and testimony showed premeditated and continuous torture, brutality, sadism and unspeakable horrors committed against all of the children over a period of time. The crimes were committed against the children constantly and it is difficult to separate the specific acts against the individual child. What was done to one--short of causing blindness and murder--was done to all. However, the Court has set forth below some of the cruel and brutal acts against Kelly Ann--in so far as trial notes and memory of testimony serve me correctly.
>
> "'Over the period of time of the later portion of Kelly Ann's short, tortuous life the defendant did these things to her on one or many occasions:
>
> 1. Beat her in the head until it was swollen.
>
> 2. Burned her hands.
>
> 3. Poked his fingers in her eyes.
>
> 4. Beat her in the abodmen until 'it was swollen like she was pregnant.'

> 5. Knocked her against a wall and 'when she fell, kicked her in the lower part of the body.'
>
> 6. Held her under water in both the bath tub and toilet.
>
> 7. Kicked her against a table which cut her head--then defendant sewed up her wound with needle and thread.
>
> 8. Scarred her head and body by beating her with a belt and board-- causing marks from her cheek, across the neck and down her back--which injuries worsened without treatment 'until the body juices came out'.
>
> 9. On one occasion beat her continuously for 45 minutes.
>
> 10. On many occasions kicked her in the stomach with his shoes on, and on the night she died he kicked her a number of times.
>
> 11. Kept her out of school so that the many scars, cuts and bruises on her body would not be seen by others.
>
> 12. Defendant made no effort to get professional medical care and attention for the child and in fact actively prevented any outsiders from discovering her condition.
>
> 13. Choked her on the night she died and when she stopped breathing he placed her body in a plastic garbage bag and buried her in an unmarked and unknown grave.'" at 437-38

The trial Judge aptly concluded:

> "'I am not easily shocked or affected by tragedy or cruelty--but this murder of a helplessdefenseless and innocent child is the most cruel, atrocious, and heinous crime I have every[sic] personally known of--and it is deserving of no sentence but death.'" at 441

With regard to voir dire, the Supreme Court found:

> "* * * As further evidenced by the record, seventy-eight prospective jurors were interviewed; allowed thirty-two peremptory challenges, the defense only exercised twenty-seven* * *." at 440

I.

THE IMPOSITION OF THE DEATH PENALTY AS TO THIS PETITIONER, PURSUANT TO A FLORIDA STATUTE PASSED SUBSEQUENTLY TO THE DATE OF THE ALLEGED OFFENSE FOR WHICH THE PETITIONER WAS CONVICTED, WAS NOT A VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS AND A DENIAL OF EQUAL PROTECTION OF THE LAWS.

ARGUMENT

Petitioner says he is the victim an ex post facto law because he was sentenced under a procedure not in effect when the crime occurred. He cites Calder v. Bull, 3 U.S. 386, 3 Dall 386 (1798).

Respondent concedes the rule of that case that a law is ex post facto if it changes the punishment and inflicts a greater punishment than that provided.by law when the crime occurred. But that rule can not avail Petitioner. His offense was punishable by death when he did it. The new provision requiring one convicted of a capitol felony to serve twenty-five calendar years without parole could not validly apply to Petitioner, Lee v. State, 294 So.2d 305 at 307 (Fla. 1974), but the death penalty could, Miller v. State, 332 So.2d 65 at 67 (Fla. 1967).

Petitioner counters by alleging that the jury recommendation to mercy in his case would have produced a life sentence under the old procedure. This is speculation on his part, because his jury would not have had the benefit of the aggravation-mitigation hearing provided by Section 921.141, Fla.Stat., or the instructions of the Court. It is impossible to say what his jury would have recommended under the old procedure, but it is clear that the old procedure could not have been applied to Petitioner because it did not pass constitutional muster under Furman v. Georgia, 408 U.S. 238 (1972). The majority opinions in Furman are replete with references to the unconstitutionality of death sentences imposed under statutory arrangements providing unbridled discretion to judge or jury. Surely Petitioner does not contend he had the right to be sentenced under an unconstitutional procedure.

Unless changes in procedure affect substantive rights they may be applied to prior offenses. See Beazell v. Ohio, 269 U.S. 165 (1925), where the change resulted in joint trial for codefendants, and Malloy v. South Carolina, 237 U.S. 180 (1915), where the method of execution of the death penalty changed. In James v. Twomey, 466 F.2d 718 at 721 (7th Cir. 1972), the court rejected the notion that a change from jury to judge in determining punishment would be ex post facto, saying:

> "Petitioner also contends that since the law in Illinois was changed to petitioner's substantial disadvantage after the commission of the offense, it is an ex post facto law, prohibited by Article I, Section 10 of the United States Constitution. Within the context of this case, it is certainly not clear that the statute as changed, even absent the 'savings clause,' made more onerous the punishment to which a defendant found guilty of rape would be exposed. Under the old code, if defendant were found guilty in a trial by jury, the jury would fix a term of imprisonment which could extend from one year to life. Under the new code the trial judge is given the responsibility of fixing an indefinite term of imprisonment, the minimum term being no less than one year, and the maximum being life. This is certainly distinguishable from the situation encountered in Lindsey v. Washington, 301 U.S. 397 S.Ct. 797, 81 L.Ed. 1182 (1937), in which the newly enacted statute required that what was merely a maximum under the old statute be mandatory term with a possibility of parole* * *". at 721

See also Donald v. Jones, 445 F.2d 601 (5th Cir. 1971), cert. den. 404 U.S. 992.

It can not be said that Florida's new procedure reduces the possibility of mercy. In fact, it is enhanced. Where only the jury could grant mercy in the past, Petitioner had the possibilities of 1) a jury recommendation which though not binding can only be set aside on facts so clear no reasonable person could differ, Tedder v. State, 322 So.2d 908 (Fla. 1975), 2) mercy from the trial Judge and 3) reduction of

sentence in the Supreme Court. That his case did not qualify was simply due to the heinous nature of what he did, as this Court recognized in Proffitt v. Florida, ___ U.S. ___, 49 L.Ed. 2d 913 (1976), Footnote 12 at 925.

Undoubtedly, Florida could have made the jury recommendation binding, as did Georgia (approved in Gregg v. Georgia, ___ U.S. ___ 49 L.Ed.2d 859 (1976). Petitioner would have been better off, but others, like Rudolph Zadnick (see Respondent's Appendix A) would have suffered. The important fact is that Petitioner was processed under a procedure upheld by this Court in Proffitt. It is the procedure which was in effect when he stood trial. It is respectfully submitted that Petitioner was entitled to no more. In Gibson v. Mississippi, 152 U.S. 565 at 590 (1896), this Court said:

> "* * * The inhibitation upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The mode of trial is always under legislative control, subject only to the condition that the legislature may not, under the guise of establishing modes or procedure and prescribing remedies, violate the accepted principles that protect an accused person against ex post facto enactments* * *." at 591

To summarize, Petitioner's theory that his sentencing procedure was an ex post facto application is without merit. Only the procedure changed, not the punishment imposable. Accordingly, despite all of Petitioner's speculations about what might have happened under other procedure, there was no ex post facto violation.

Petitioner's equal protection argument that there may have been other defendants worthy of the death penalty who escaped their just rewards was before this Court in Proffitt, and was rejected, 49 L.Ed.2d at 924 and Footnote 16 at 927. Respondent will simply note that Petitioner and Rudolph Lee are not the only pre-Furman offenders still subject to the death penalty. The Miller of Miller v. State, supra, is another, and others are still working their way through the Florida Courts.

II.

WHETHER THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE PETITIONER'S TRIAL DOES NOT SHOW INHERENT PREJUDICE IN THE PRE-TRIAL SETTING AND JURY SELECTION PROCESS TO THE EXTENT THAT THE PETITIONER WAS DENIED DUE PROCESS OF LAW.

Respondent relies on this Court's recent decision in Murphy v. Florida, 421 U.S. 794 (1975), where this Court stated:

> "The constitutional standard of fairness requires that a defendant have 'a panel of impartial, 'indifferent' jurors.' Irvin v. Dowd, 366 US, at 722, 6 L Ed 2d 751, 81 S Ct 1639. Qualified however, be totally ignorant of the facts and issues involved.
>
> > 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' Id., at 723, 6 L Ed 2d 751, 81 S Ct 1639." at 799-800

The publicity on Murphy contained highly prejudical material about unrelated offenses and convictions. Petitioner has not and can not show what his publicity contained with a capacity to prejudice him which approaches that on Murphy.

Murphy's trial Judge did nothing to insulate prospective jurors from news coverage, or to limit discussion among prospective jurors (see 421 US at 803-804). Petitioner's trial Judge entered an order March 12, 1974, prohibiting attorneys, witnesses and court personnel from releasing further statements about the case.(Petition p. 9) He instructed prospective jurors not to discuss the case (Respondent's Appendix B). Trial jurors were instructed repeatedly not to discuss the case and to avoid media accounts (see e.g., Respondent's Appendix C). When the trial began, the jury was sequestered (Respondent's Appendix D).

Petitioner had thirty-two peremptory challenges available. When the jury was accepted he had five remaining. This alone demonstrates that he did not encounter that degree of hostility which would make it impossible to select a fair jury. The voir dire bears this out (Respondent's Appendix E). Of the eighty-eight prospective jurors examined (including selection of alternate jurors), fifteen had never heard of Petitioner or his case. Twenty-two more had heard of him, but had formed no opinion. Twelve had heard enough to form an opinion which they thought could be set aside. Only twenty-four, less than one-third, expressed any great difficulty in setting aside the opinion that had formed from what they heard.

By Respondent's count, of the eighty-eight prospective jurors, the defense excused twenty-seven, and the State excused nineteen. Of the twenty-five excused for cause, four were for hardship reasons and two were excused under Witherspoon v. Illinois, 391 U.S 510 (1968) for fixed views on the death penalty. Thus, only nineteen were excused for prejudice against Petitioner, one based not on the media, but on personal knowledge, and some if not all based in part on the prejudice inherent in the charges, prejudice which could not have been avoided wherever the case was tried.

Comparing Murphy again, all seventy-eight of his prospective jurors had heard of him. Twenty were excused for cause for having prejudged him (421 US at 796). Just as some of Murphy's prospective jurors thought him innocent based on what they had heard, some of Petitioner's prospective jurors thought him innocent because the bodies were not found.

In all aspects, Petitioner's case falls short of the showing made in Murphy. If a change of venue was not required for "Murph the Surf", it certainly was not mandatory for Petitioner.

CONCLUSION

It is respectfully submitted that this case presents no substantial federal question not already decided in Proffitt v. Florida, supra. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

By______________________
CHARLES W. MUSGROVE
Assistant Attorney General

THE CAPITOL
Tallahassee, FL 32304

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida has been furnished Honorable Louis O. Frost, Jr., Public Defender, Fourth Judicial Circuit, 221 Duval County Courthouse, Jacksonville, FL 32202, via Mail, this 29th day of September, 1976.

CHARLES W. MUSGROVE
Assistant Attorney General

OF COUNSEL FOR RESPONDENT

APPENDICES

84 .96 RECORD
Dec 2 3 27 PM '74
OR 2586 PG 926

IN THE Circuit COURT
OF THE NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NUMBER CR74-1866

STATE OF FLORIDA,

Plaintiff,

-vs

Rudolph Zadnik

Defendant.

FILED IN OPEN COURT
THIS 27 DAY OF Nov, 1974
R. P. Kirkland, Clerk
By [illegible]

JUDGMENT AND SENTENCE

You Rudolph Zadnik, being now before the Court, attended by your attorney, James Valerino, and you having (1) been tried and found guilty of ~~(2) pleaded guilty to (3) plead of nolo contendere to~~ First Degree Murder - Count One

the Court Adjudges that you are guilty of said offense, and it is the Sentence of the Law and the Judgment of the Court that you Rudolph Zadnik, be committed to the custody of the (1) Florida Division of Corrections ~~(2) Orange County Correctional Facility (3) Orange County Jail.~~ to be imprisoned at Hard Labor for ~~a term of~~ the remainder of your natural life with credit for time previously served

and you are further Ordered to pay a fine and cost in the amount of $ 2.00.

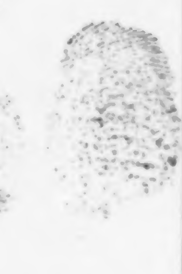
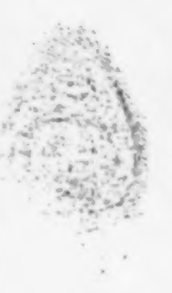
DONE and ADJUDGED in open Court at Orlando, Orange County, Florida this the 27th day of November, 1974, pursuant to Rules 3.670 and 3.700 RCrP.

Peter M. deManio
Judge

STATE OF FLORIDA, COUNTY OF ORANGE I HEREBY CERTIFY,
that the above and foregoing is a true copy of the original filed in this office.
[illegible] P. KIRKLAND, Clerk Circuit Court

Dated 9/24/76 By Sandra Mayo D.C.

(Fingerprints, if required by Sec. 30.31 Florida Statutes)

4 FINGERS TAKEN SIMULTANEOUSLY	LEFT THUMB	RIGHT THUMB	4 FINGERS TAKEN SIMULTANEOUSLY
LEFT HAND 			RIGHT HAND

I hereby certify that the above and foregoing fingerprints on this judgment are the fingerprints of the defendant Rudolph Zadnik, and that they were placed thereon by said defendant in my presence, in open court, this the 27th day of November, 1974, pursuant to Sec. 30.31.

RECORDED & RECORD VERIFIED

County Comptroller, Orange Co., Fla.

Peter M. deManio
Judge

32-11 (3/73)

APPENDIX A

c/c to S.O. Orig. to File 11/27/74

[illegible] 11-27-74

47897 RECORDED
DEC 2 3 27 PM '74
OR 2586 PG 927

IN THE Circuit COURT
OF THE NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NUMBER CR74-1866

STATE OF FLORIDA,
Plaintiff,

-vs-

Rudolph Zadnik
Defendant.

FILED IN OPEN COURT
THIS 27 DAY OF Nov, 1974
R. P. Kirkland, Clerk
BY D.C.

C/C to S.O. Orig to Rec: 11/27/74

JUDGMENT AND SENTENCE

You Rudolph Zadnik, being now before the Court, attended by your attorney, James Valerino, and you having (1) been tried and found guilty of ~~(2) pleaded guilty to (3) pleaded nolo contendere to~~ First Degree Murder - Count Two

the Court Adjudges that you are guilty of said offense, and it is the Sentence of the Law and the Judgment of the Court that you Rudolph Zadnik, be committed to the custody of the (1) Florida Division of Corrections ~~(2) Orange County Correctional Facility (3) Orange County Jail~~ to be imprisoned at Hard Labor for ~~a term of~~ the remainder of your natural life consecutive with the sentence imposed in Count One

and you are further Ordered to pay a fine and cost in the amount of $ 200.

DONE and ADJUDGED in open Court at Orlando, Orange County, Florida this the 27th day of November, 1974, pursuant to Rules 3.670 and 3.700 RCrP.

STATE OF FLORIDA, COUNTY OF ORANGE I HEREBY CERTIFY,
that the above and foregoing is a true copy of the original filed in this office.
[illegible], Clerk Circuit Court

Dated 9/24/76 By Sandra Meyer D.C.

Peter M. de Manio
Judge

(Fingerprints, if required by Sec. 30.31 Florida Statutes)

4 FINGERS TAKEN SIMULTANEOUSLY	LEFT THUMB	RIGHT THUMB	4 FINGERS TAKEN SIMULTANEOUSLY
LEFT HAND			RIGHT HAND

Fingerprinted by 11-27-74

I hereby certify that the above and foregoing fingerprints on this judgment are the fingerprints of the defendant Rudolph Zadnik, and that they were placed thereon by said defendant in my presence, in open court, this the 27th day of November, 1974, pursuant to Sec. 30.31.

RECORDED & RECORD VERIFIED

County Comptroller, Orange Co., Fla.

Peter M. de Manio
Judge

32-11 (3/73)

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA.

INDICTMENT NO. 74-1866

STATE OF FLORIDA,

Plaintiff,

vs.

RUDOLPH ZADNIK,

Defendant.

FILED IN OPEN COURT
THIS 27 DAY OF Nov, 1974
R. P. Kirkland, Clerk
By Virginia Lee [illegible] D.C.

ADVISORY SENTENCE (AS TO COUNT I)

We, the Jury, vote as follows:

2 recommend life imprisonment

10 recommend punishment by death

Dated at Orlando, Orange County, Florida this 27 day of Nov, 1974.

FOREMAN

STATE OF FLORIDA, COUNTY OF ORANGE I HEREBY CERTIFY,
that the above and foregoing is a true copy of the original filed in this office.
[illegible], Clerk Circuit Court
Dated 9/24/76 By Sandra Mays D.C.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA.

INDICTMENT NO. 74-1866

STATE OF FLORIDA,

Plaintiff,

vs.

RUDOLPH ZADNIK,

Defendant.

FILED IN OPEN COURT
THIS 27 DAY OF Nov, 1974
R. P. Kirkland, Clerk
By Virginia Lee [illegible] D.C.

ADVISORY SENTENCE (AS TO COUNT II)

We, the Jury, vote as follows:

0 recommend life imprisonment

12 recommend punishment by death

Dated at Orlando, Orange County, Florida this 27 day of Nov, 1974.

FOREMAN

STATE OF FLORIDA, COUNTY OF ORANGE I HEREBY CERTIFY,
that the above and foregoing is a true copy of the original filed in this office.
[illegible], Clerk Circuit Court
Dated 9/24/76 By Sandra Mays D.C.

venire.)

THE COURT: Now, Ladies and Gentlemen of the jury panel, I know that you must feel as though we are playing musical chairs with you. We started out in one Courtroom this morning and now we're in another, and before the day is over you will be in another Courtroom but the reason for that is this: While the jurors are being selected they will sit in this jury box here. Now, while the attorneys are questioning the jurors, those of you who are not being questioned will be next door in Courtroom Number 4. The reason for that need not be explained at this time, but you will not hear what is being said or any of the answers which are given during the jury selection. Courtroom Number 4 is next door. While you are in that Courtroom you may be very informal. The Courtroom itself has restroom facilities and you may discuss the weather, golf, baseball,

anything you choose except you will not discuss this case in any manner. Now, until such time as you are called into this Courtroom -- as I said before, you will be at ease, very informal; there will be a bailiff with you. If you have any questions, needs or requirements, you ask him; and, from time to time, since you are not allowed to smoke in the Courtroom, you may step out into the hallway or you may go back into the jury room in the back of the Courtroom where the restroom facilities are and there's a sitting room there. You avail yourselves of those facilities. If all of you at this time will please follow Mr. Highsmith at the door to Courtroom Number 4.

(Jury venire absent)

THE COURT: All right, let the record show that the jury panel is outside of this Courtroom and out of the hearing of this Court; that those present are Mr. Shorstein, Mr. Southwood and

BEST COPY AVAILABLE

speculate on what might have occurred, had the objection not been sustained and you must not speculate as to what a witness might have said, had the witness been permitted to answer the question.

You are instructed not to visit the scene of the alleged crime, should it be necessary for you to view the scene, you will be taken there as a group, under the supervision of the Court.

In the course of this trial, the Court may take one or more recesses, during which recess you will be permitted to separate and go about your personal affairs.

Now, during these recesses, you will not discuss this case with anyone, nor will you permit anyone to say anything to you, or in your presence about this case.

If, anyone, attempts to say anything to you, or in your presence about this case, then you tell them that you are on the Jury trying this case, and ask them to stop, if they persist, then leave them at once and report the matter to the Court immediately upon your return to Court.

SUCH CONDUCT ON THEIR PART WOULD BE CONTEMPT OF COURT - TO BE PUNISHED AS SUCH.

You are instructed not to read, listen to, nor watch and news reports of this trial. The evidence in this case comes to you only in the courtroom, and it must be considered by you free from any outside influence.

Now, the reason for this is that, news reports are NOT limited to the evidence, and may contain material which is of no concern, whatsoever, to you, but which might tend to influence you one way or the other.

This case must be tried solely upon the evidence produced in the Courtroom in the presence of :

"I understand you're serving on the Jury, let me tell you so and so, and so and so." We don't want that to happen.

If somebody might learn you are serving on the Jury, and I don't know that they might, and they might want to call you about the case, should anyone do that, you advise them you cannot discuss it and terminate the conversation about it.

Now, in a moment we will know what time we can have the Courtroom on Monday.

I ask you to be back on Monday with the overnight bag and other possessions or whatever, and bring it with you.

We will have a city bus which was chartered exclusively for your use during this trial. You will leave here and go out in a group and get on the bus. The driver will take you to and from the hotel during the course of the trial.

All right, we use this big Courtroom for the Judges to qualify about four hundred jurors each Monday. This is the only one available with the twelve man jury box. Judge Cox said it won't be available until about 10:30 Monday.

I admonish you or instruct you to be back Monday morning at 10:30. Bring your bags with you. When you come in the Courtroom go directly to your jury room. Take your bags back there. Then you will be staying at the Hilton Hotel after that.

Now, there are television sets in your hotel rooms. Now, my bailiffs will be with you. They will see that you don't watch news programs. You will be out of touch with the news. They will see that you don't look at news programs. You will be allowed to read anything but the bailiffs will see you don't read articles about the case.

The rooms have TV but no radio. We won't be concerned about that. I suggest you not take a radio with you. If radios are in the rooms, the bailiffs will see you don't listen to anything

about the case.

While staying in the hotel the members of your family or those that you need to be in contact with, you may give them your phone number. For example, maybe an emergency will come up. The family might have to reach you.

The bailiff will see that the operator at the switchboard has that. You will be able to call out. When you call out, you won't discuss the case in any way.

You will only receive those calls from immediate members of the family or somebody that it is necessary to contact you in case of an emergency.

Mr. Southwood and Mr. Frost, and Mr. Shorstein, are there any further admonitions that you would like to request?

MR. SHORSTEIN: The State has none.

MR. SOUTHWOOD: We have none.

THE COURT: Mr. Frost?

MR. FROST: No, sir.

THE COURT: With sincere apologies for

SUMMARY OF JURY SELECTION

The confusion as to how jurors were interviewed arises from whether the selection of alternate jurors is counted. The jury of twelve was selected after seventy-eight were interviewed. Ten more were interviewed to get three alternates.

To spare this Court from reading 1400 pages of jury selection, this narrative is presented. By Respondent's count, of eighty-eight interviewed, fifteen were chosen, and two were left over, unchallenged, when the jury was complete. The defense excused twenty-seven peremptorily, and the State excused nineteen. Twenty-five were excused for cause, four of those for hardship reasons: Basil Pritchard, George Davis, Herbert Roziers and Lillian Presser, and two others for unwillingness to vote guilty in a death case: Robert Wollitz, Grace Kelly.

In the following summary those who served as jurors or alternates are in bold print.

The following fifteen had not heard of the case before trial: RUFUS WILLIAMS*, MARY ALEXANDER*, Cheryl Price, Belinda Gary, Juliette Redding, Joseph Boyle, MICHAEL GLADIN*, James Wright, Georgia Hart, Minnie Betha, Donald Allen, Ann Young, George Davis, Josephine Harris, Herbert Roziers.

The following twenty-two had heard of the case, but had not formed an opinion: Donald Vanek, Basil Pritchard, Dale Charpentier, WILLIS VANAME*, THOMAS YOUNGBLOOD*, Audrey Towery, Jeanette Vurnakes, Clark Pownell, James Towler, Nellie Price, James Tull, Patty Jo Lawton, Florian Price, Lois Geary, Helen Smith, Judith Chesser, Grace Kelly, BETTY PRICE*, Lillian Presser, Minnie Hancock, Nathaniel Purdy, RAMONA GREEN*.

The following twelve had formed an opinion, but thought they could set it aside: Garwood Hall, George Vonstelle, Robert Wollitz, Vernon Chaussee, Wayne Steed, Lawrence Worten, TERESA WRIGHT*, SUSAN RACKLEY*, JACQUELYNN FERNANDEZ*, WALTER SMITH*, MARGUERITE HALL*, Thomas Pritchard.

The following twenty-four expressed lesser or greater degrees of difficulty is setting aside their opinions: Arvey Bennett, Ted Szymanski, Vivian Chilcott, Larry Johnson, Robert Williams, John Adams, Edward Lehman, Jean Price, Betty Lewis, Bonnie Speth, Joseph Haywood, Sylvia Wiles, Archie Alderman, Mary Taggart, William Davies, Sara Lewis, Wayne Guthrie, Judy Lepore, Willie Caudill, James Pierce, Nancy Adams, Carl Wilson, Barbara Torrent, Nancy Johnson.

Two indicated they had formed an opinion of innocence based on absence of the bodies: Michael Powers, James Lewis. Another, James Tillman, hinted at the same thing by answering that he had not formed an opinion of guilt. Four others indicated they would have trouble convicting without the bodies. Ann Young, Georgie Davis, Walter Smith, Nancy Johnson.

Some were prejudiced, not by the media, but by the nature of the case: Mary Alexander, Belinda Gary, Helen Smith, Vernon Chaussee, Marguerite Hall, Robert Williams, Betty Lewis, Sylvia Wiles, Sara Lewis. One was prejudiced based on her own personal knowledge, Francis Raymond.

Supreme Court, U. S.
FILED
JAN 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5306

ERNEST JOHN DOBBERT, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1976

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ERNEST JOHN DOBBERT, JR.,

Petitioner,

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STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Florida Supreme Court (A. 51) affirming the judgment and sentence of the Circuit Court of the Fourth Judicial Circuit of Florida is reported at 328 So.2d 433 (Fla., January 14, 1976). The Order of the Florida Supreme Court denying the petition for rehearing (A. 80) also appears at 328 So.2d 433 (Fla., April 5, 1976).

JURISDICTION

The decision of the Florida Supreme Court was handed down January 14, 1976. A timely petition for rehearing was filed (A. 73), duly amended (A. 78) and denied April 5, 1976 (A. 80). A motion for extension of time to file the petition for a writ of certiorari was granted by Justice Powell June 16, 1976, with leave to file by September 2, 1976. The petition was timely filed and was granted on November 8, 1976 (A. 99). A motion for extension of time for the filing of the brief on the merits was granted by Justice Powell on December 9, 1976, with leave to file by January 7, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3) (1970).

QUESTIONS PRESENTED

1. Whether the imposition of the death penalty, as to this Petitioner, pursuant to a Florida statute which became effective subsequent to the date of the offense for which the Petitioner was convicted, was a violation of the Florida and Federal Ex Post Facto prohibitions and a denial of equal protection of the laws.
2. Whether the totality of the circumstances surrounding the Petitioner's trial shows inherent prejudice in the pre-trial setting and jury selection process to the extent that the Petitioner was denied due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., art I, Section 10.
U.S. Const., amend. XIV, Section 1.

Fla. Const., art. I, Section 10.
Fla. Const., art. X, Section 9.
Fla. Stat., Section 921.141 (1971).
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Fla. Stat., Section 775.082 (1972).
Fla. Stat., Section 775.082 (1973).
Ch. 72-724, Laws of Florida (1972).
Fla. Stat., Section 921.141 (1973).

The pertinent verbatim texts of the above-cited provisions appear at A. 87 *et seq.*

PRELIMINARY STATEMENT

References to the Record on Appeal, Volume I, will be designated by the symbol "R" in parentheses followed by the appropriate page number. References to the Record on Appeal, Volumes II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII, which are the transcripts of various pre-trial court proceedings, will be designated by the appropriate volume number in parentheses followed by the appropriate page number. References to the Record on Appeal, Volumes XIV and XV, which is the transcript of the hearing on the motion for change of venue, will be designated by the symbols "CV" in parentheses followed by the appropriate page number. References to the Record on Appeal, Volumes XVI through XXIX, which is the transcript of jury selection and trial, will be designated by the symbols "Tr" in parentheses followed by the appropriate page number. References to the Record on Appeal, Volume XXX, which is the proceedings on the jury advisory sentence, will be designated by the symbols "JA" in parentheses followed by the appropriate page number.

STATEMENT

In January of 1972, an anonymous phone call notified the Division of Family Services (a subdivision of the Florida Department of Health and Rehabilitative Services) that there was evidence of child abuse at the residence of Ernest John Dobbert, Jr., in Jacksonville, Florida. A social worker from the Division of Family Services contacted a neighbor of Mr. Dobbert and made a preliminary determination that the anonymous caller had been mistaken. Before closing the case, the social worker personally contacted Mr. Dobbert and was told that the Dobbert children were in good health. The worker observed one child with Mr. Dobbert and was told by Mr. Dobbert that one other child was living with him in Jacksonville and that the other two children were in Wisconsin with Dobbert's mother. Mr. Dobbert further informed the worker that he intended to leave Jacksonville with the two children and return to his mother's home in Wisconsin. Following this meeting with Mr. Dobbert, the case was closed and filed away.

In the Spring of 1972, the Petitioner's son, Ernest John Dobbert, III, was found wandering outside a Holiday Inn in Jacksonville, Florida. Jacksonville police turned the boy over to the Division of Family Services. It was apparent that the boy had suffered injuries of one type or another to his back, his head and his feet. Upon questioning, the boy initially indicated that he scraped his back on coral while swimming off a local beach. Following a brief confrontation with the Petitioner, the boy was taken before a local circuit judge who promptly placed the boy in the protective custody of the Division of Family Services. The boy told the judge that his injuries were a result of beatings by his father, that his brother and one of his sisters were dead

as a result of beatings by his father, and that his remaining sister was at home with the father locked in a closet. The judge issued a warrant for Petitioner's arrest. Prior to service of the warrant, Petitioner left Jacksonville and apparently proceeded to Fort Lauderdale, Florida. On April 13, 1973, Petitioner's daughter, Honore Elizabeth Dobbert, was found in a hospital in Fort Lauderdale with a note pinned to her clothing asking that she be sent to her mother in Wisconsin. The Petitioner's abandoned automobile was found under a bridge at the edge of the Intracoastal Waterway in Fort Lauderdale with a suicide note on the front seat. The two Dobbert children were reunited under the protective custody of the Division of Family Services in Jacksonville and a search for their father, the Petitioner, began.

Press coverage began almost immediately and closely followed Petitioner's arrest in Texas and his ultimate extradition and return to Florida in October of 1973.

An indictment (A. 2) was filed December 27, 1973, charging the Petitioner with two counts of murder in the first degree and two counts of child torture. On January 14, 1973, Petitioner filed a Motion to Dismiss addressed to the Indictment of December 23, 1973, stating in paragraph 2:

> "The allegations contained therein are vague and indefinite in violation of the Constitutions of the United States and of the State of Florida because the bare allegation of a Statute number does not adequately and constitutionally inform the Defendant of what statutory violation he has been charged or inform the Defendant of whether the indictment and subsequent proceedings under that statute will violate the prohibition against ex post facto laws or violate the equal protection or other constitutional protections guaranteed to the Defendant. . . ." (R 7).

In ruling on the motion, the trial court made the following marginal notations on the face of the motion proper:

> (Left Margin) "See Lee case '1st District' Nov. 73 – which says crime committed under old 782.04[1] – subject to new 782.04; 921.121"
>
> (Right margin) "See Rudolph V. Lee case re: comit (sic) crime before death penalty subject to New death penalty." (R 7).

On January 15, 1973, Petitioner filed a motion (A. 7) requesting the trial court to enter an order specifying the manner of trial, number of trial jurors, and the penalties applicable to counts one and two of the indictment. As grounds for the motion, Petitioner stated:

> "1. The indictment herein only alleges a violation of Florida Statutes 782.04 and the undersigned attorney submits that there is presently great confusion in the law as to the manner of trial and the applicable penalties in a case where the alleged offense occurred at the time specified in this indictment.
>
> 2. The confusion exists as a result of the case of *State v. Lee*, Case No. R-452, 1st DCA Florida, November 2, 1973, question certified to Florida Supreme Court January 7, 1974.
>
> 3. Unless this court enters its pretrial order as requested, defense counsel is unable to properly advise the defendant herein and is unable to properly prepare a defense."

The first degree murder charged in count one of the indictment of December 27, 1973, alleged that the death occurred on December 31, 1971. The first degree murder charged in count two of the indictment alleged that the death occurred between the 1st day of January and the 8th day of April, 1972. The trial court entered an order (A. 16) which sets forth verbatim:

> The within motion coming on to be heard in open Court, defendant being present and arguments presented, IT IS, THEREUPON, CONSIDERED ORDERED AND ADJUDGED that said Motion be and the same is hereby (sic) the court rules that this is a capital-death penalty with twelve man jury – DONE AND ORDERED in open Court this 22nd day of February, A.D. 1974."

On January 30, 1974, Petitioner filed a motion for continuance (A. 8). The trial court denied the motion for continuance on February 4, 1974. On February 8, 1974, the State filed an amended indictment, again charging two counts of murder in the first degree and two counts of child torture. Also on February 8, 1974, the Petitioner filed an application for constitutional stay of trial (A. 81). The application, filed pursuant to Rule 4.5(g), Florida Appellate Rules, raised the question of an *ex post facto* application of the new Florida death penalty sentencing statute.[2]

At the time of Petitioner's application for stay of trial in the Florida Supreme Court, the case of *Lee v. State*, 294 So.2d 305 (Fla. 1974), was on petition for writ of certiorari to that court and oral arguments were pending therein.

Oral arguments were heard on Petitioner's application for stay of trial on February 18, 1974, and an order denying the application was entered the same day.

---

[1] Fla. Stat., Section 782.04 (1971) and Fla. Stat., Section 782.04 (1973) set forth the elements of the crime of murder in the State of Florida.

[2] Ch. 72-724 (A. 89) which went into effect December 8, 1972.

On March 7, 1974, Petitioner filed a motion and affidavit for change of venue (A. 17), pursuant to Rule 3.240, Florida Rules of Criminal Procedure, and cited as grounds, *inter alia*:

> "1. That Defendant stands accused of acts which are inherently odious and subject to inflammatory exploitation by the press and the electronic news media.
>
> 2. That the acts of which Defendant stands accused have in fact been widely exploited by the press and the electronic news media to the extent that Duval County, Florida, has become irreparably permeated with prejudicial publicity.
>
> 3. That the extensive publicity concerning the Defendant has included detailed accounts of the investigation of the case, a search for bodies by certain members of the Jacksonville Police Department accompanied by television news men, the flight of the Defendant, his subsequent extradition and arrest and lengthy speculation concerning the probable development of the factual and legal issues to be decided at trial.
>
> 4. That, as a result of the extensive publicity in this case, defendant has become known by name to the general populous of Duval County and Northeast Florida and that his name has come to be equated with the odious and infamous crime of child torture.
>
> 5. That the notoriety of this Defendant has been cited in the local press by an official employed by the Division of Family Services (State Department of Health and Rehabilitative Services) as a causative factor in the documented increase in reported cases of child abuse in Duval County, Florida.
>
> 6. That as a direct consequence of this extensive publicity and resulting notoriety, the atmosphere prevailing at this time, and likely to become exacerbated during the period immediately preceding trial, is so latent with the possibility of prejudice to this Defendant that there is reason to believe that a fair and impartial trial cannot be had in Duval County, Florida."

The supporting affidavits of three prominent Jacksonville attorneys were filed with the motion (A. 19-24). On March 12, 1974, following eleven months of continuous and unrelenting publicity concerning the case, the trial court entered a "gag order" (A. 25) forbidding the Jacksonville Sheriff's Office and all court personnel from making statements to the news media at any time before or during the trial. On March 15, 1974, an evidentiary hearing on the Petitioner's motion for change of venue was held (CV 4-284). The Petitioner presented twelve witnesses, representatives of the news media in Jacksonville, Florida, displayed video taped news stories and introduced exhibits of media coverage of the case. Following arguments of counsel, the trial court entered the following order:

> "Motion under advisement after one day of testimony & evidence, till it is determined from jury selection – if it (sic) possible to get a fair & impartial jury." (A. 27).

Jury selection was scheduled for March 18, 1974. Prior to the commencement of the voir dire examination, the Petitioner objected to the method of trial selected by the trial court:

> "MR. SOUTHWOOD: Your Honor, also at this time I recall there was a motion made by the defense to – that the court set forth the number of jurors in which (sic) this case will be tried. The court made its ruling. I did not see a written order to that effect and since I did not actually move to have it tried one way or the other, I would like to formally object at this time to the case being tried

> by twelve jurors and having the death penalty applicable to the first two counts.
>
> THE COURT: Yes, sir. All right, the court previously ruled that this was a death penalty or capital case and that the manner of trial would be by twelve man jury with the appropriate number of alternatives. All right, I deny the motion." (Tr 25).

The voir dire examination began the morning of March 19, 1974, and continued until 10:15 A.M., Thursday, March 21, 1974, when counsel for Petitioner announced:

> "MR. SOUTHWOOD: The defense accepts the jurors tentatively. We would like to say that we do it with reservations. The defendant moved for a change of venue. It was taken under advisement and denied pending jury selection. The defendant does not waive this motion. The evidence presented in the change of venue shows the defendant would not receive a fair trial in Duval County. . . . [I]t would be unfair, and it further prejudiced the defendant's right to a fair trial if we were required to exercise all our peremptory challenges, since he must choose from a jury panel here in Duval County. Be tried from a jury panel here in Duval County. It must be clear on the record we don't waive our change of venue motion, but we will accept this jury because it is the best jury under the circumstances, but does not meet the constitutional standards for fair trial." (Tr 1266).

Eighty-eight veniremen had been interviewed. Prior to the final day of jury selection, the Petitioner had exercised twenty-seven of his thirty-two peremptory challenges. There were forty-seven prospective jurors remaining for selection in the courtroom and seventy-five more available on call from the regular circuit court panel of jurors not used by other courts in session.

Out of the eighty-eight examined on voir dire, only thirteen had no knowledge of the facts of the case. Of the thirteen, two were ultimately chosen to sit as jurors, seven were excused by the State, two were excused by the Petitioner, and two were excused for cause.

The trial proper began on March 25, 1974. On Friday, March 29, 1974, the jury returned verdicts of guilty of murder in the first degree as to count one of the amended indictment, guilty of murder in the second degree as to count two, guilty of child abuse (a lesser included offense) on count three, and guilty of child torture on count four.

A hearing pursuant to the new Florida death penalty sentencing provision was held the following morning. Prior to the commencement of the hearing proper, the Petitioner again objected to the application of the death penalty to this case:

> "MR. SOUTHWOOD: Judge, may I make just one note –
>
> THE COURT: Yes, sir.
>
> MR. SOUTHWOOD: – for the purpose of the record? I would like to further object to this proceeding in that I do not feel, again, that the death penalty is applicable in this particular case or, of course, constitutional in any other crimes." (JA 20).

The court reiterated its earlier ruling as follows:

> "THE COURT: All right, I deny the motion, proceeding under various cases as the Rudolph Valentine Lee and other cases which I think justify the bifurcated trial." (JA 20).

Following the presentation of psychiatric reports and the arguments of counsel, the jury rendered an advisory sentence finding sufficient mitigating circumstances outweighing any aggravating circumstances and recommending by a ten to two majority a sentence of life imprisonment (A. 28).

The Petitioner filed a timely motion for new trial on April 8, 1974 (A. 30). The motion for new trial was denied by the trial court on April 12, 1974 (A. 32). On that date the trial court overruled the advisory sentence of the jury and sentenced the Petitioner to death on count one of the amended indictment and to the maximum prison terms on counts two through four, all sentences to be served consecutively (A. 33).

The Petitioner was adjudged insolvent for purposes of appeal and a timely notice of appeal to the Florida Supreme Court was filed on April 25, 1974. The constitutional questions presented here were assigned as errors on appeal, briefed and appeared before the Florida Supreme Court as follows:

> "II. THE TRIAL COURT ERRED IN FAILING TO CHANGE VENUE AND IN PROCEEDING WITH TRIAL IN JACKSONVILLE, FLORIDA.
>
> III. THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO DEATH.
>
> A. THE TRIAL COURT ERRED IN RULING THAT CAPITAL PUNISHMENT WAS APPLICABLE IN THE CASE AT BAR."

Oral arguments were heard by the Florida Supreme Court on April 3, 1975, and the court affirmed the judgment and conviction in the trial court. *Dobbert v. State*, 328 So.2d 433 (Fla. January 14, 1976) (A. 51).

The Florida Supreme Court did not address the *ex post facto* question in its decision. As to the trial court's failure to grant the Petitioner's motion for a change of venue, the majority opinion, citing *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed 2d 589 (1975), held that the trial judge did not abuse his discretion in denying the motion for change of venue. *Dobbert* at 440.

There were two dissenting opinions: Justice Boyd would have reversed for the trial court's failure to charge the jury that it was authorized by law to find the Petitioner guilty of attempted murder and for the failure of the trial court to grant the Petitioner's motion for change of venue; Justice England would have reversed the trial court's decision to overrule the advisory sentence of the jury and would have required the adoption of the jury's recommendation of life imprisonment, citing *Tedder v. State*, 332 So.2d 908 (Fla. 1975).

Petition for Rehearing was denied on April 5, 1976. Application for Stay of Execution of the death sentence in this case was granted by Justice Powell on May 3, 1976. A Motion for Extension of Time to File the Petition for Writ of Certiorari was granted by Justice Powell on June 21, 1976. The petition was granted on November 8, 1976 (A. 99).

SUMMARY OF ARGUMENT

The *Ex Post Facto* Violation

Petitioner argues that the application of the December 8, 1972 Florida Statutes concerning the imposition of penalties for capital crimes to the 1974 trial of a defendant charged with a pre-*Furman* capital crime was in violation of the Florida and Federal prohibitions against *ex post facto* laws. In support of this position, Petitioner argues that he was exposed to a greater penalty than that *which would have effectively been applied to him* under the law in effect at the time of the alleged offense, and that the standard of punishment under the 1972 statutes was more onerous than under the law at the time of the alleged offense.

Petitioner's argument is based on the different results achieved by the application of the 1971 and 1972 statutes respectively, as illustrated by the following:

A. By application of the Florida death penalty statute which went into effect on December 8, 1972,[3] the Petitioner was sentenced to death. By application of the Florida death penalty statute in effect on December 31, 1971[4] (the alleged date of the offense for which Petitioner was convicted and sentenced to death), and pursuant to the decisions of this Court and the Florida Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972), respectively, Petitioner could have received no more than a sentence of life imprisonment.

B. By application of an associated Florida sentencing statute which became effective December 8, 1972,[5] Petitioner went to trial facing the possibility of a sentence of death or life imprisonment with no eligibility for parole for twenty-five years. By application of the related sentencing statute in effect on December 31, 1971,[6] the Petitioner would have faced the possibility of a sentence of death or life imprisonment with no restriction on his eligibility for parole.

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[3] Fla. Stat., Section 921.141 (1973), Ch. 72-724, Laws of Florida (1972) (A. 91-98).

[4] Fla. Stat., Section 921.141 (1971) (A. 88).

[5] Fla. Stat., Section 775.082(1) (1973), Ch. 72-724, Laws of Florida (1972) (A. 88-89, 91).

[6] Fla. Stat., Section 775.082 (1971) (A. 88).

C. By application of the two related Florida statutes in effect at the time of Petitioner's trial, conviction and sentencing, the trial judge was permitted to overrule a ten to two majority recommendation by the jury and impose a sentence of death. By application of the two related Florida statutes in effect at the time of the alleged offense, a jury recommendation of mercy could not be ignored or overruled by the trial judge. The law mandated that upon "a recommendation to mercy by a majority of the jury . . . the punishment *shall* be life imprisonment." (Emphasis added), Fla. Stat., Section 775.082(1) (1971) (A. 88).

The Denial of Equal Protection

Petitioner argues that the death penalty was not applicable to Petitioner, and its application in this case constituted a denial of equal protection of the laws. All individuals whose crimes were committed pre-*Furman* and who were convicted and sentenced to death prior to the effective date of the new Florida death penalty statutes have had their death sentences commuted to life imprisonment.[7] Had Petitioner been arrested, tried, convicted and sentenced to death prior to the effective date of the new statutes, his sentence would have been commuted to life. It is a denial of equal protection of the laws to apply the new statutes retroactively.

The equal protection argument can best be illustrated by the following hypothetical:

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[7] In every case the new sentence was life imprisonment with no restriction on eligibility for parole. *See Anderson v. State*, 267 So.2d 8 (Fla. 1972); *In Re Baker*, 267 So.2d 331 (Fla. 1972); *Rudolph Valentine Lee v. State*, ____ So.2d ____ (Fla. December 9, 1976).

If Petitioner's wife had been charged as a co-defendant in the December 31, 1971 murder of Kelly Ann Dobbert; if she had been tried, convicted and sentenced to *death* under the provisions of the 1971 statutes (with no jury recommendation of mercy); then, by operation of the decisions of the Florida Supreme Court in *Anderson v. State*, 267 So.2d 8 (Fla. 1972) and *In Re Baker*, 267 So.2d 331 (Fla. 1972), her death sentence would have been commuted to life. Petitioner is not brought to trial until 1974. Upon conviction his jury votes ten to two for life imprisonment. Instead, the trial judge overrules the jury and imposes the death sentence. The disparate results are brought about solely due to the difference in the dates of the respective trials.

There can be no valid basis for such an invidious discrimination.[8]

Change of Venue – Due Process

Petitioner argues that the denial of his pre-trial motion for change of venue and his subsequent trial in Jacksonville, Duval County, Florida, exposed him to trial by a jury panel composed of members of a community irreparably permeated with prejudicial publicity so that he was denied due process of law.

The Petitioner's trial was conducted in the heated atmosphere of an intensive pre-trial media barrage which continued unabated throughout the proceedings notwithstanding a gag order imposed on court personnel and police. By ordering Petitioner to attempt to select a jury in this atmosphere, the trial court presented Petitioner with a Hobson's choice: select the least prejudiced of the local jurors, or arbitrarily exercise all peremptory challenges in order to preserve an issue for appeal.

There are cases where the infection of the public by pre-trial publicity is patent. Prejudice inheres in the trial setting by virtue of the nature of the offense and the means by which the news concerning it is hammered into the psyche of the community. This is such a case.

ARGUMENT

I.

THE APPLICATION OF A FLORIDA DEATH PENALTY PROVISION NOT IN EXISTENCE AT THE TIME OF THE OFFENSE CHARGED WAS A VIOLATION OF CONSTITUTIONAL EX POST FACTO PROHIBITIONS.

A. Life imprisonment was the only penalty for first degree murder in effect on December 31, 1971.

Historically, violations of constitutional *ex post facto* prohibitions have been measured against the standards set by Mr. Justice Chase in *Calder v. Bull*, 3 U.S. 386 (1798):

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[8] Petitioner has become aware of the existence of other Florida defendants who fall into the same category of pre-*Furman* crime–death penalty applied. *See Miller v. State*, 332 So.2d 65 (Fla. April 7, 1976). There may be other such defendants yet to come to trial. This in no way alters the validity of the equal protection argument. In *Miller*, the sole reason for the trial being held after the effective date of the new death penalty statutes was the defendant's incompetence to stand trial. He remained in a state mental health facility until August 22, 1973, and was convicted on February 23, 1974. *Id.* at 67. It would appear that Miller also has a valid equal protection argument as well as a valid *ex post facto* claim.

> "I will state what I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.* 4th. Every law that alters the legal rules of evidence, and receives, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." (Emphasis added) *Id.* at 390.

These basic categories have been extended by later courts to encompass situations where a change in the law of a state as applied to an individual makes "more onerous" the effect of the law, *Lindsey v. Washington*, 301 U.S. 397 (1937), or acts to the substantial disadvantage of the individual. *Kring v. Missouri*, 107 U.S. 221 (1882).

A related standard has developed out of the case law since *Calder v. Bull, supra*. For a law to be classified as *ex post facto* in its application it must be shown to have effected a change in the substantive law rather than to have merely changed the procedure by which an individual makes his way through the criminal justice system, *Thompson v. Utah*, 170 U.S. 348 (1898) and *Beazell v. Ohio*, 269 U.S. 167 (1925).

In order to apply these standards in the case sub judice, it is first necessary to establish what was the law in effect at the time of the alleged offense and what effect it could have on Petitioner in light of this Court's decision in *Furman, supra*, and subsequent Florida decisions.

Respondent's position below was that the penalty for first degree murder in effect at the time of the offense in this case was death and that the penalty at the time Petitioner was sentenced was death so that there was no change in the punishment and therefore no *ex post facto* violation. Petitioner would assert that there was no *valid* death penalty provision in effect at the time of the alleged offense.

There was a statute providing for a death penalty in capital crimes in existence on the date of the alleged offense,[9] as well as a statute for implementation of the death penalty.[10] But as of December 31, 1971, there had not been an execution in the State of Florida since 1964. The statutes noted above were under attack in state and federal courts and similar statutes in Georgia and other states were before this Court in *Furman, supra*. The Georgia and other related death penalty statutes were voided in that decision on June 29, 1972.

Following the decision in *Furman, supra*, some confusion arose over its application to the Florida statutes. This was soon dispelled by the Florida Supreme Court in *Donaldson v. Sack, supra* wherein the court stated:

> "We have examined every reasonable avenue to uphold the several statutes and rules insofar as they assert 'capital offense,' as we must do under the rule favoring validity unless clearly indicated otherwise. We are unable in the face of existing authorities and logic to find support for the continuance of 'capital offense' as heretofore applied. Accordingly, it must fall with the U.S. Supreme Court's holding against the death penalty

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[9] Fla. Stat., Section 775.082(1) (1971) (A. 88).

[10] Fla. Stat., Section 921.141 (1971) (A. 87).

> as provided under present legislation. Our decision is compelled by that Court's action." At 501.

The immediate result of the decisions in *Furman* and *Donaldson v. Sack, supra*, was the re-sentencing by the Florida Supreme Court of all prisoners under sentence of death in the State of Florida to life imprisonment. *Anderson v. Florida, supra, In re Baker, supra*, and *Adderly v. Wainwright*, 58 F.R.D. 389 (M.D. Fla. 1972).

With no "capital offenses" punishable by death in the State of Florida, anyone accused on December 31, 1971 (the date of the alleged offense in the case sub judice), of what had been a capital offense and sentenced to death would have had his sentence commuted to life. There could be no valid penalty of death imposed for crimes committed prior to *Furman, supra*. Notwithstanding the statutory language in effect, the only possible sentence for a crime committed on December 31, 1971 was life imprisonment.

The retroactive commutation of prior death sentences in *Anderson, Baker* and *Adderly, supra*, was done in recognition of the fact that the existing statutes were constitutionally void insofar as they provided for a penalty of death. *Donaldson v. Sack, supra.* The subsequent enactment of new death penalty provisions[11] could not act to revive the death penalty for crimes committed prior to their effective date.[12]

Following *Furman, supra*, the Georgia Supreme Court acted to remove the possibility of a death sentence for capital crimes:

> "In view of the recent decisions by the Supreme Court of the United States in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed 2d 346, and related cases, which prohibit further imposition of the death penalty under existing statutes, direction is given to the trial court as follows: The presiding judge in the trial court shall enter a judgment sentencing the defendant to be imprisoned for the balance of his life, this being the only lawful sentence which may be entered upon the conviction and finding of the jury that the defendant should receive the maximum sentence permitted by law." *Sirmans v. State*, 194 S.E.2d 476 (Ga. 1972) at 477.

The Georgia legislature soon enacted a new death penalty statute which was applied to one Chester Thomas Akins. Akins was convicted of kidnapping, rape and burglary, all of which were alleged to have accurred on November 19, 1972. The new act was signed into law on March 28, 1973, and Akins was sentenced to death in May of 1973.

In reversing the death sentence, the Georgia Supreme Court, *citing Sirmans*, held:

> "At the time the crimes here occurred a death sentence could not be imposed, and the later enacted statute, if applicable to the defendant here, would of necessity be an ex post facto law. Ex post facto laws are clearly prohibited." *Akins v. State*, 202 S.E.2d 62 (Ga. 1973).

This is not to say that trials could not still be conducted pursuant to the pre-*Furman* statutes. The Florida Supreme Court in *Donaldson v. Sack, supra*, invalidated only the application of the death penalty under those statutes:

> "The elimination of the death penalty from the statute does not of course destroy the entire statute. We have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for

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[11] Ch. 72-724, Laws of Florida (1972).

[12] Ch. 72-724 went into effect on December 8, 1972.

doing so and of course this clearly exists in these circumstances." At 502-503.

In review, there was no valid death penalty in effect at the time of the offense in this case. There remained a valid procedure established by the highest court of the State of Florida for sentencing an individual convicted of a "capital offense" to life imprisonment.[13] Procedure was to be conformed to the trial of non-capital cases with six rather than twelve jurors and no requirement of *Witherspoon*[14] qualification on *voir dire.*

By applying the December 8, 1972, death penalty statutes the trial court changed the possible punishment from life to life or death.[15] There could be no more substantive change in the law.

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[13] "We find no difficulty with a continuation of the *sentencing* for these former 'capital offenses' under Section 775.082(1) as automatically life imprisonment, inasmuch as that is the only offense left in the statute." (Emphasis added), *Donaldson, supra* at 502.

[14] *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

[15] The trial court was not unaware of the procedures outlined in *Donaldson v. Sack, supra*, and was in fact in the process of completing pre-trial motions in the case of the State of Florida v. Franklin Delano Prince. Prince was tried for first degree murder before a jury of six, convicted, and was sentenced to life imprisonment pursuant to the pre-*Furman* statutes without a recommendation from the jury. The trial ended January 25, 1973 and sentencing was on February 2, 1973, for a September, 1972 crime after the effective date of the new Florida death penalty statutes. *See, Prince v. State*, 297 So.2d 648 (1st DCA Fla. 1974), *cert. den. on other grounds*, 304 So.2d 129 (Fla. 1975).

B. Allowing the trial judge to overrule a jury recommendation of mercy acted to deprive Petitioner of a substantial right.

1. If it can be argued that the 1971 death penalty statutes were in full force and effect on December 31, 1971, then that statute must be compared in operation to the statutes which went into effect on December 8, 1972.

If Petitioner had been sentenced under Section 921.141, Florida Statutes (1971) (A. 87), there would have been no bifurcated penalty trial. The jury would have been asked to return a verdict with or without a recommendation of mercy. Upon a recommendation of mercy the trial judge would have had no choice but to sentence the Petitioner to life imprisonment.

In fact, the Petitioner was sentenced pursuant to Section 921.141, Florida Statutes (1973) (A. 95). A bifurcated penalty trial was held (JA 3-73) wherein virtually the only mitigation presented was a reading of an excerpt from Louis Nizer's book describing the executions of Ethel and Julius Rosenberg.[16]

The advisory sentence rendered by the jury was a majority (ten-to-two) recommendation of life imprisonment (A. 28). The trial court exercised his option under the new statute and imposed a sentence of death (A. 33).

The result is that where Petitioner's jury's recommendation of life imprisonment would have been followed automatically under the law at the time of the offense, it was overruled and converted to a death sentence by application of the new law.

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[16] *The Implosion Conspiracy*, Louis Nizer, Doubleday and Company, Garden City, New York (1973).

2. Regardless of the actual recommendation by Petitioner's jury and the ultimate sentence of death, the statutory change effected by the Florida Legislature in Chapter 72-724, Laws of Florida (1972), relating to the discretion afforded the trial judge in sentencing, added a measure of punishment not present in the earlier law.

While the new statutes were upheld by the Florida Supreme Court in *State v. Dixon*, 283 So.2d 1 (1973), and by this Court in *Proffitt v. Florida*, 96 S.Ct. 2960, ____ U.S. ____ (July 2, 1976), the nature of the prejudice to Petitioner is not altered. Petitioner had a substantial right in the absolute discretion of the jury to decide whether he would live or die.

In *Winston v. State*, 198 S.E. 667 (Ga. 1939), the Georgia Supreme Court was faced with a 1938 statute which removed the power to determine life or death sentences in capital cases from the jury and vested that power solely in the trial judge. In holding that the statute was *ex post facto* to an individual whose crime was committed prior to its effective date the court stated:

> ". . . Assuming without deciding that it was the intent of the legislature to empower the judge in capital cases, under the procedure outlined in the statute, to reduce the death penalty to life imprisonment . . . the new act of 1938, supra, was nevertheless ex post facto and inoperative as to the offense charged against the accused, in that, if enforced, it would operate to withdraw a substantial protection which surrounded him at the time of the commission of the alleged offense, to-wit, the right to a recommendation of mercy by the jury as a matter of grace (carrying a life sentence only), irrespective of the evidence or record, and irrespective of any procedure outlined in the new statute." *Id.* at 669.

Accord, Todd v. State, 187 S.E.2d 831 (Ga. 1972).

The supreme courts of Delaware and North Carolina responded to *Furman, supra*, by voiding all elements of jury discretiion in their respective death penalty statutes and leaving a mandatory death penalty upon conviction of a capital offense. *State v. Dickerson*, 298 A.2d 761 (Del. 1972) and *State v. Waddell*, 194 S.E.2d 19 (N.C. 1973). Recognizing that the removal of jury discretion constituted "an upward change of penalty be legislative action," *Waddell, supra* at 29, the North Carolina Supreme Court stated:

> "It thus appears that where the punishment at the time of the offense was death or life imprisonment in the discretion of the jury, as is the case before us, a change by the Legislature to death alone would be *ex post facto* as to such offenses committed prior to the change (cites) . . . For the reasons stated we hold that North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any offense committed after such date." *Id.*

While the amended Florida death penalty statute does not impose a mandatory death sentence it does convert what was a certainty (life upon recommendation to mercy) to a very uncertain proposition, thereby exposing Petitioner to the enhanced prospect of a sentence of death.

3. The Florida Supreme Court held in *Lee v. State*, 294 So.2d 305 (Fla. 1974), that the twenty-five year no parole provision of Section 775.082(1) (1973) would be *ex post facto* if applied to an individual convicted of a pre-*Furman* offense. The Court then split the issue – yes, *ex post facto* as to the parole provision, no, not *ex post facto* as to the application of

the death penalty – and remanded Lee for resentencing pursuant to the "law in effect at the time of the commission of the offense." *Lee, supra* at 307.

As argued above, if Petitioner were to be remanded for re-sentencing, the only sentence which could be imposed is life imprisonment (with no restriction on eligibility for parole).

Petitioner can only agree with the statement in *Lee, supra*, that the addition of the delayed eligibility for parole provision exposes Petitioner to "a greater penalty" and is "an *ex post facto* application and clearly unconstitutional." *Id.* at 308.

This Court has expressed an opinion on the question of parole eligibility in *Warden v. Marrero*, 417 U.S. 662 (1974). In *Marrero*, Congress repealed a law denying parole to narcotics offenders.[17] Marrero was sentenced prior to the repeal of the no parole provision and by a habeas corpus proceeding sought to have the new statute[18] apply to him. This Court, in holding that a federal savings provision[19] preserved the no-parole provision for offenders convicted and sentenced prior to its repeal, first sought to establish that a deprivation of parole eligibility is penal in nature:

> "There are additional reasons for believing that the no-parole provision is an element of respondent's 'punishment.' First, only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole (Cites). For the confined prisoner, parole – even with its legal restraints – is a long step toward regaining lost freedom. . . . Second, a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause of Art. I, Section 9, cl. 3 (here dealing with federal legislation), of the Constitution, of whether it imposed a 'greater or more severe *punishment* than was prescribed by law at the time of the . . . offense.'
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> * * *
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> Thus, at least where, as in the case of respondent's narcotics offenses, Congress has barred parole eligibility *as a punitive measure*, we hold that the no-parole provision . . . is a 'penalty, forfeiture or liability. . . .' " *Id.* at 663, 664. *See also Love v. Fitzharris*, 311 F. Supp. 702 (N.D. Cal. 1970).

In deciding whether a statute is *ex post facto* in its application, courts should look to the "standard of punishment prescribed rather than to the sentence actually imposed." *Lindsey v. Washington*, 301 U.S. 397 (1937). The fact that Petitioner did not in fact receive a sentence of life imprisonment does not preclude a finding that he was exposed to the greater penalty and thus should be re-sentenced.

II.

APPLICATION OF THE DEATH PENALTY TO PETITIONER WAS A DENIAL OF EQUAL PROTECTION OF THE LAWS.

Since the date of filing of the petition in this cause, the Florida Supreme Court has receded from its earlier (1974) decision in *Lee v. State, supra.* Petitioner is of the opinion that the decision in *Rudolph Valentine Lee v. State of Florida, supra*, is dispositive of the equal protection issue. The Florida court reviewed the manner in which Lee had been sentenced to death, then to life imprisonment and finally to death again in the confusion of legislative and judicial action in the aftermath of *Furman, supra.*

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[17] 26 U.S.C., Section 7237(d) (1964).

[18] 18 U.S.C., Section 4202 (1970).

[19] 18 U.S.C., Section 1103(a) (1970).

The court recognized the anomalous result achieved by applying the new death penalty to Lee when *Furman* and *Donaldson v. Sack, supra*, had clearly voided the death penalty for pre-*Furman* offenders:

> "Had the able attorney who represented the appellant at trial not requested the trial judge to reduce the death sentence under the then – recent *Furman* decision, *this appellant's sentence would have been reduced to life in Anderson v. State, supra.*" (Emphasis added) *Rudolph Valentine Lee, supra.*

Had Petitioner been tried for his pre-*Furman* offense prior to the enactment of the new death penalty statutes, and had he been sentenced to *death*, that sentence would have been reduced to life pursuant to *Anderson* and *Baker, supra.* Courts must establish some point of reference upon which to base decisions affecting substantial rights of individuals. The Fourteenth Amendment equal protection clause denies "to the states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Although, under this standard "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," it is impossible to attribute any rational basis for applying the new death penalty statute to Petitioner.

The obvious objective of the Florida legislation in the wake of the *Furman* decision was to conform Florida law to that holding and to provide for more severe punishment in the event the new death penalty provisions would not pass constitutional muster. This is

evidenced by the no-parole provision of Chapter 72-118, Laws of Florida which was ultimately amended to the current twenty-five year restriction on parole eligibility of Section 775-082(1), F.S.A. (1975).

In *Baker, supra*, it was noted that if the class of pre-*Furman* offenders could not be re-sentenced to life imprisonment prior to the effective date of Chapter 72-118, *supra*, serious constitutional problems would be encountered:

> "The Petitioner asserts that the Attorney General, the several circuit judges, state attorneys, public defenders have all shown great concern and have worked hard and cooperatively to achieve these re-sentencings in a speedy manner, thereby avoiding unnecessary litigation as to the validity of C. 72-118. . . . To allow this burdensome situation to fester into great constitutional litigation when all concerned have worked hard to avoid such a confrontation seems pointless. Moreover, since the Supreme Court of Florida has already acted with dispatch on behalf of a number of these persons, it would be a denial of equal protection and due process of law to deny similar relief to all persons whose death sentences have been vacated but who have not yet been re-sentenced to a term of years or life imprisonment as the case may be." *Id.* n. 4 at 334.

The court went on to state that:

> "There appears to be no reason why the remaining members of the class need be treated differently. To do so would create a class statutorily denied parole, while facing life terms in prison. The uniqueness of this position would fester litigation attacking both the facial validity of the statute (C. 72-118) and its selective application to an indistinguishable few – a seeming denial of equal protection." *Id.* at 334, 335.

The expedited re-sentencing accomplished in *Baker, supra*, was opposed by the state. The apparent reason was to attempt to bring those offenders within Chapter 72-118. In the case *sub judice* the State seeks to exclude Petitioner from the class of pre-*Furman* defendants. The court in *Anderson* and *Baker, supra*, dealt with the class of convicted and sentenced pre-*Furman* offenders. It would perhaps have been premature but surely not outside the authority of that court to widen the class to encompass all individuals charged with offenses occurring prior to the effective date of the new death penalty statutes.[20]

If a co-defendant had been charged with the same offense for which Petitioner was sentenced to death, and if the co-defendant had been apprehended, tried and convicted contemporaneously with Rudolph Valentine Lee, the ultimate sentence could have been no more than life imprisonment with no restriction on eligibility for parole. Where fundamental values are concerned, classifications must be closely scrutinized to

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[20] There were in fact defendants charged with "capital" offenses who were tried as non-capital "life" cases in the same trial circuit in which Petitioner was tried and sentenced to death. In fact the case of *Franklin Delano Prince, supra*, was tried before the same trial judge as Petitioner for first degree murder. Prince, as noted earlier, was tried before a jury of six and faced a maximum sentence of life imprisonment. *Prince v. State, supra.* The case of *Edred Augustus Black*, Case No. 72-4821, Division R of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, was a first degree murder prosecution tried before a jury of six between May 20, 1974 and May 24, 1974. Even more anomalous is the fact that all three defendants on appeal in *State ex rel Manucy v. Wadsworth*, 293 So.2d 345 (Fla. 1974), were charged with "capital" crimes yet tried as non-capital cases after the enactment of the new death penalty statutes. *Manucy* was cited in *Miller v. State, supra*, in support of the holding that application of the new statutes was not *ex post facto.*

insure that they correspond to valid state concerns urged as supporting them. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669-670 (1966) *citing Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). There can be no more fundamental value than life itself. Before a life may be taken by judicial action a most stringent review of the criteria for applying the extreme penalty must be undertaken, *Proffitt, supra*, in order that similar results are reached in similar cases. 96 S.Ct. at 2966, *citing State v. Dixon*, 283 So.2d 1, 10 (1973).

In *Rudolph Valentine Lee, supra*, the court did not think that "the question of whether a person should live or be put to death by the State should be determined by the legal procedures of when his request for reduction of sentence was made." Petitioner should not have that question decided by the fact that he was tried, convicted and sentenced subsequent to December 8, 1972.

The Florida Supreme Court held in *Lee*:

> "We have considered the issue carefully, and it is our judgment that the constitutional mandate of equal protection requires reduction of appellant's sentence from death to life." *Id.*

Petitioner would ask for no less.

In deciding what law should have been applied to Petitioner the Florida Supreme Court apparently overlooked the general savings provision of the Florida Constitution, Article X, Section 9, which provides: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This provision of the 1968 Florida Constitution amended the earlier Article III, Section 32 of the 1885 Florida Constitution which provided: "the repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment." These provisions have a long history in the case law of the State of Florida. Petitioner raised the provision as a bar to trying his case under the new death penalty statutes in his brief on appeal to the Florida Supreme Court, but the issue was not addressed in the decision of the court. *Dobbert, supra.*

The provision has been interpreted in the same manner as the *ex post facto* clauses of the state and federal constitutions.[21] In *Raines v. State*, 42 Fla. 141, 28 So. 57 (1900), the plaintiff in error, Raines, complained of being sentenced as a felon when the crime for which he had been convicted was converted to a misdemeanor prior to sentencing. Citing the 1885 savings provision the Florida Supreme Court said:

> ". . . but Section 32 of Article III of our constitution . . . prevents the said Chapter 4728 from affecting either the prosecution or prior prescribed penalties for any crime committed prior to the taking effect of such *ex post facto* law. The effect of this constitutional provision is to give to all criminal legislation a prospective effectiveness; that is to say, the repeal or amendment, by subsequent legislation, of a pre-existing criminal statute, does not become effective, either as a repeal or amendment of such pre-existing statute, insofar as offenses are concerned that have been already committed prior to the taking effect of such repealing and amending law." *Id.* at 58.

The provision operates to require the application of the original law whether or not the change is procedural or substantive. In *Ex Parte Brown*, 93 Fla. 332, 111 So. 518 (1927), the Supreme Court of Florida agreed with Mr. Brown that pursuant to the savings provision, he was entitled to be hung rather than electrocuted when a successful appeal of his first conviction carried the second trial and conviction into the era of execution in the electric chair:

> "The sentence should have been hanging, as provided by the statutes as of October, 1923, when the crime was committed, and not by electrocution under the statute which became effective January 1, 1924." *Id.* at 519.

See also, Sigsbee v. State, 43 Fla. 524, 30 So. 816 (1901), *Whatley v. State*, 46 Fla. 145, 35 So. 80 (1903), *Gray v. State*, 72 Fla. 487, 73 So. 583 (1916), *Shields v. State*, 78 Fla. 524, 83 So. 391 (1919), *Higginbotham v. State*, 88 Fla. 26, 101 So. 233 (1924), and *Washington v. Dowling*, 92 Fla. 601, 109 So. 588 (1926).

The provision also operates regardless of the effect of the repeal or amendment upon the accused.[22] In recent years the Florida courts have utilized this savings provision to defeat a sentence of four years in the state prison upon a revocation of probation when the maximum sentence at the time the individual was placed on probation was two years. *Rozinski v. State*, 298 So.2d 546 (2d DCA Fla. 1974); to uphold a sentence of seven years in the state prison when the maximum term had been reduced subsequent to the date of the offense. *Ellis v. State*, 298 So.2d 527 (2d DCA Fla. 1974), *cert. dismissed* 298 So.2d 411 (Fla. 1974). *Accord, Cooper v. Wainwright*, 308 So.2d 182 (4th DCA Fla. 1975) and *Lane v. State*, 337 So.2d 976 (Fla. September 23, 1976).

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[21] The failure of the Florida Supreme Court to address the issue and apply the state constitutional provision might more properly be considered as a violation of Fourteenth Amendment due process, although the issue was not framed as such in the petition.

[22] Ordinarily the *ex post facto* clause is not applied to defeat the prospective application of a statute which ameliorates or mitigates an individual's crime or punishment.

In an official opinion of the Attorney General of Florida, number 72-75 of March 10, 1972, an issue very similar to that in the case sub judice was submitted.

The Florida rape statute, prior to January 1, 1972, provided that upon a recommendation of mercy by the jury, a person convicted of rape would be sentenced to life *or any term of years*, within the discretion of the judge. The 1972 amendment removed the possibility of any sentence other than life imprisonment.

The Attorney General addressed the issue of a rape *committed* prior to January 1, 1972:

> "However, this change in penalties has no effect upon the punishment for rape committed prior to January 1, 1972, even though a conviction was not obtained until on or after that date; in such a case the penalty provided by section 794.01, Florida Statutes *1969*, is to be imposed and this means that if there is a recommendation of mercy, the defendant may be sentenced to either life imprisonment or any term of years. This is so because Article X, Section 9, 1968 Constitution of Florida, provides that:
>
> > 'SECTION 9. Repeal of criminal statutes.—Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.'
>
> Turner v. State, 99 So. 334, 336 (Fla), illustrates the application of a former constitutional provision to exactly the same effect as said Article X, Section 9, viz., Article III, Section 32, Florida Constitution of 1885." 75 Op. Atty. Gen. (1972).

The Attorney General of the State of Florida thus has recognized the binding effect of Article X, Section 9 of the Florida Constitution. The case law interpreting this provision has consistently upheld the view expressed in the Attorney General's opinion, *supra.*

The proper course of action for the trial court in the case sub judice was to first attempt to place the Petitioner in the same position he would have been if there had been no repeal or amendment of Florida Statutes, Sections 775.082(1) (1971) and 921.141 (1971). Since Florida death penalty statutes had been ruled unconstitutional at the time of Petitioner's offense, the trial court should have gone forward with the understanding that the maximum penalty remaining after *Furman* and *Donaldson v. Sack, supra*, would be life imprisonment. Petitioner and those other individuals whose crimes were committed during the time when no death penalty could be imposed are entitled to equal protection under this constitutional savings clause.

III.

PETITIONER DID NOT RECEIVE A FAIR TRIAL IN JACKSONVILLE, FLORIDA DUE TO THE SATURATION OF THE COMMUNITY WITH INHERENTLY PREJUDICIAL PUBLICITY.

The denial of Petitioner's motion for change of venue in the trial court, affirmed by the Supreme Court of Florida below, presents a violation of the Due Process Clause of the Fourteenth Amendment factually distinguishable from this Court's recent decision in *Murphy v. Florida*, 421 U.S. 794 (1975).

The sole question raised by Petitioner relevant to the issues ruled upon by this Court in *Murphy, supra*, is whether or not the trial setting was inherently prejudicial to the extent that a fair and impartial jury could not be selected to try the case.

The standard of *Irvin v. Dowd*, 366 U.S. 717 (1961), has not been altered by the decision in *Murphy*. This

Court will set aside the conviction in the Florida court below only if, after considering the totality of the circumstances, it is satisfied that the "fundamental principles of liberty and justice" necessary to ensure "those minimal historic safeguards for securing trial by reason" have been disregarded. *McNabb v. United States*, 318 U.S. 332, 340-341 (1943), *citing Herbert v. Louisiana*, 272 U.S. 312 (1926).

Applying this standard requires a factual, case-by-case comparison. Petitioner assumes that the decision in *Murphy* has not established archetypal prejudicial situations without which there can be no reversal. The day when cameras are allowed into the courtroom and reporters allowed to sit at counsel tables are hopefully long past. State courts in general are not so provincial that they ignore the teachings of such momentous rulings as *Sheppard v. Maxwell*, 384 U.S. 333 (1966), *Estes v. Texas*, 381 U.S. 532 (1965), and *Rideau v. Louisiana*, 373 U.S. 723 (1963). Their effect has been to generally improve the conditions in state jury trials and more particularly our method of handling the trials of spectacular, big-press cases from that which caused Mr. Justice Frankfurter to lament in *Irvin v. Dowd*:

> "More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.... [N]ot a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts.... exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of propossessions, evidence submitted in open court." 366 U.S. at 729, 730.

Indeed, the trial judge in the case *sub judice* acted, on the whole, reasonably in regard to the handling of publicity *during* the trial proper. The various court personnel and the attorneys on both sides were placed under a "gag-order" several days prior to jury selection. The order was issued *sua sponte* by the court. The jurors were properly admonished not to talk among themselves about the case during the voir dire and trial. The jurors were sequestered throughout the trial.

Petitioner, however, would ask this Court to review the publicity which *preceded* any action by the trial court and which led the prosecutor in the case to announce to the press following the conviction that this was the "biggest criminal trial in Jacksonville's history." (Jacksonville Journal, April 6, 1974).

Petitioner's case is not "on all fours" with Murph the Surf's, Dr. Sam Shepard's or with Billy Sol Estes'. Petitioner became the "notorious" child torturer Ernest John Dobbert, according to an article in the Jacksonville Journal dated April 18, 1973 (Exhibit 9, CV 102). His name became equated with child abuse in the City of Jacksonville.

Petitioner's crime was not robbery, as in *Murphy, supra*, or even an alleged passion – motived murder, as in *Sheppard, supra. Petitioner was charged with the systematic torture of his four children and with the premeditated murder of a son and a daughter, of tender years.* Petitioner does not argue that such a case could never be tried, only that a trial held in a community charged with emotion[23] and steeped in the melodrama of the case history, could not comport with constitutional due process.

The material presented in the local press in Petitioner's case was substantive information concerning the preparation of the prosecution's case. Much of the information was inaccurate and inadmissible at trial. The trial court did nothing to prevent the local authorities (police, assistant state attorneys and representatives of the Division of Family Services) from disseminating the leads and leaks which found their way into the community via the media. Counsel for Petitioner was present throughout these proceedings and of course cannot convey to the Court the full extent to which the publicity pervaded the community. The following is offered as an aide to understanding the overwhelming and prejudicial nature of the media coverage:

Summary of Evidence and Testimony Presented at the Hearing on the Appellant's Motion for Change of Venue

WAPE is a Jacksonville Radio Station. In keeping with Federal Communications Commission rules, WAPE only keeps stories as old as six months (CV 10). All the

stories that WAPE presented during its news broadcasts over the past six months were accepted into evidence as Appellant's Exhibit 1. WAPE presents numerous news broadcasts through the hour and throughout the day, Monday through Friday (CV 12-13). From the records kept, there was no way of determining how many times each story had been presented on the air (CV 12). In the metropolitan Jacksonville area, during the period October and November of 1975, WAPE had an approximate listening audience over eighteen years of age of 103,300 during the period of 6:00 in the morning until midnight, Monday through Friday (CV 15-17).

WAPE files included twenty-two stories presented on the air from October 29, 1973 until March 15, 1974, the day of the change of venue hearing. The stories detailed the Appellant's return from Texas after losing his fight against extradition and stated:

> ". . . He is also being questioned about claims made by the son that he buried two other children. The boy told officials that a six-year-old brother, Ryder, and a nine-year-old sister, Kelly Ann, died in 1971 and 1972. He said Dobbert placed the bodies in plastic bags and finally buried them. No bodies were found in a search by authorities last year."

Other stories spoke about the possibility of a body-finding device being borrowed from the Navy to search for the children and wide speculation concerning where the bodies might be located. Louis David Blackshear, a news reporter with WAPE during the time prior to the only stories which were retained, covered the case at bar from its inception. He broadcast stories on almost a daily basis for over a month at the time the alleged crime was uncovered (CV 24-25).

WVOJ, a Jacksonville radio station, retained copies of news stories for one year (CV 25). WVOJ audience is

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[23] Following the conviction and prior to sentencing, it was discovered that the trial judge received a number of letters. The contents were released to the press following sentencing and revealed the deep-seated feelings against Petitioner. For example: "Put this 'thing' to death . . . I do not sign this letter because this 'thing' will probably be paroled in seven years and I don't want to be another victim" and, "All men in this office feel he should be burned." Florida Times Union and Jacksonville Journal, articles dated April 15, 1974.

11,861 average listenership per hour from 6:00 A.M. until 7:00 P.M. (CV 26-28). This basic audience is in Duval County (CV 28).

WVOJ records included forty-six stories concerning the case at bar. Included in these were interviews with an FBI spokesman after the Appellant had been arrested in Houston, Texas; five taped interviews with Chief of Detectives Matt Touchton, of the Jacksonville Sheriff's Office, commenting upon the children, upon their burial, the interrogation of the Appellant and his state of mind. The State Attorney was quoted in two taped interviews concerning the penalty for child torture in relation to the case at bar and advocating that the penalty for child torture be increased to life imprisonment. A later interview, after a search in the Jacksonville Beaches, with Matt Touchton concerned the possibility of finding the bodies and the fact that Chief of Detectives Touchton felt that he had a good enough case without the bodies to prosecute for murder. The Chief Assistant Attorney who prosecuted the case at bar gave two taped statements which were broadcast by WVOJ concerning his optimism upon sustaining a conviction and whether he would seek the death penalty for the Appellant.

WQIK, another Jacksonville radio station, did not locally cover the case, but instead ran continuous stories from the Associated Press news coverage (CV 38-39). Monday through Friday, from 6:00 A.M. until 10:00 P.M. approximately 50,000 people listen to WQIK (CV 41-43).

WJAX radio did not originate local stories on the case at bar but used the stories which came from United Press International (CV 46-47). Each twenty-four hours, approximately 17,900 adult listeners heard WJAX (CV 47-49).

WMBR radio covered the case at bar locally (CV 51). WMBR kept stories from March, 1973 (CV 52-53). As

with most of the other stations, few of the tape cartridges which contain statements by officials concerning this case were available for transcription at the time of the hearing. (Exhibit 3, cover letter.) WMBR does not subscribe to the rating services, but is a twenty-four hour radio station, with the primary coverage in Duval County (CV 55-56).

WMBR files contained one hundred and six stories presented concerning the case at bar in the year prior to the change of venue hearing. Included in these were two interviews with the Chief Assistant State Attorney who would try the case and one interview with the State Attorney himself. The stories gave great import to the statements given by young John Dobbert to the police concerning the burial of his brother and sister and the trial court's statement at the hearing on the State's motion to raise bond that "I just wonder whether fifty-thousand is enough." On November 1, WMBR ran a story that the Appellant was seeking immunity and that if this was given him he "might lead" the police to where the bodies were buried, that he might "remember." This story was repeated on November 2. The Appellant's wife and her accompaniment of police officers in search of the bodies of the two missing children was also given large play. The court-ordered psychiatric exams were thoroughly covered as was the hearing at which the trial court adjudged the Appellant mentally competent to stand trial. Each of the Appellant's court appearances was covered by WMBR's courthouse reporter.

WIVY radio in Jacksonville, Florida, only kept broadcast stories from October of 1973. WIVY-FM broadcasts twenty-four hours a day and on AM from sunrise to sunset.

WIVY records included six stories, all from October, 1973. These stories included statements, such as:

"They may be through with Ernest Dobbert in Texas by next week. But Jacksonville police won't be through with him for a long time. Not until he has been on trial for child torture. Right now the two of his children still alive are in a mental hospital in Wisconsin. After the beatings and brutalities those two went through before they turned up abandoned two years ago in Jacksonville it's no wonder. It took police a year to find Dobbert in Texas, but Jacksonville police still remembered him and that's something he can't forget.

* * *

At the police station the grilling goes on but so far Dobbert isn't talking. Ernest John Dobbert is sitting in the chair Detectives G. H. Parker and E. L. Monroe are firing the questions. They're trying to find out if the prisoner they've just brought back from Houston will tell them what he did with two of his children. John Dobbert age 11 turned up beaten and bruised a year and a half ago and said he helped his father bury his brother and sister. But the secret is still buried deep in the very troubled mind of Ernest John Dobbert.

* * *

You remember Ernest John Dobbert. It was a year and a half ago when Dobbert's young son John turned up beaten and burned and told that horrible story to Jacksonville police. How he had helped his father bury his brother and sister. You remember the fake suicide that almost brought the case to a close. Well now Dobbert's back. . . .

* * *

The man who knows where the bodies are buried is back. But so far he isn't talking. . . . Police haven't found the bodies but now they've got the burier and this case isn't closed yet. . . .

* * *

Police never found those young bodies but now they've got the one man who can tell them. Jacksonville Police brought Dobbert back from Houston, Texas yesterday. He's been in jail there since March. He didn't want to come back to Jacksonville. But he's back and now there's a score police want to settle.

* * *

. . . The word from the police station is he's talking more now, but he still isn't telling where the bodies of two of his children are buried. And until he does he'll be buried in jail . . . and when he does too."

WOBS radio story files go back as far as April 17, 1972. WOBS presents news three minutes an hour and, two years before, had presented four five-minute newscasts per day. 20,000 persons in Jacksonville listen to WOBS between 6:00 A.M. and sunset (CV 73-74).

WOBS files showed seventeen stories concerning the case at bar. In one, the case at bar was identified as "that child abuse case that has been in the news for so long and nothing yet has happened." The stories stated that "according to Dobbert's son, Ernest, Jr. (sic), his father buried the bodies of his brother and his sister last year." Another story stated:

> "According to Assistant State Attorney Harry Shorstein since the return of accused child torturer Ernest Dobbert to Jax., his office has been flooded with a number of calls from persons suggesting secret military weapons which could be used to find Dobbert's two missing children. Shorstein said some of the suggestions sounded good, but that no secret devices exist."

WPDQ radio in Jacksonville had recently undergone a managerial change and records were only available from January of 1974 (CV 78-79). Three stories were admitted into evidence.

WJKS-TV, Jacksonville's UHF television station, presented two stories on the case at bar since December of 1973. Approximately 15,000 adults watch the news on WJKS (CV 88-89). Robert Ernest Walker, news director at WJKS, testified that on the date of the first news item, December 27, 1973, he received two phone calls from the Chief Assistant State Attorney, one indicating that the grand jury was deliberating and the second stating that the grand jury had returned an indictment (CV 93, 95).

The Florida Times-Union and the Jacksonville Journal are Jacksonville's only daily newspapers. The Times-Union has a circulation in Duval County of over 107,000 circulation in the morning and the Jacksonville Journal has approximately a 58,000 person circulation in the afternoon. The Sunday newspaper, a joint venture of the Times-Union and the Journal, has a circulation of over 130,000 persons per Sunday. (Exhibit 9, CV 102). The Times-Union and Journal ran approximately eighty-seven stories on the case at bar from April 14, 1972, until the day of the change of venue hearing. Arthur Allen Frederickson, Sr., Assistant Executive Editor of both newspapers, testified on cross-examination that he was confident the source of any information or story in the case at bar was the investigative officers involved (CV 106).

The first newspaper story appeared under the headline "GRISLY CHILD-ABUSE CASE PROBED – police seek father and child-abuse case," on April 14, 1972. On April 15, the newspaper ran a follow-up story including pictures of the Appellant, his wife, and the four children. On April 16, the Florida Times-Union ran a story under the headline, "Dobbert's Neighbor is Sorry She Kept Silent – 'I Won't Forget That Boy's Back' ". On April 17, the headlines stated, "Wife of Alleged Child Beater Arrives Here."

A banner headline in the Jacksonville Journal of April 18, 1972, stated, "DAUGHTER IN TORTURE CASE FOUND UNHARMED; SUICIDE BY FATHER?" Other stories explained that the police "Continue Hunt for Graves." The Jacksonville Journal claimed that "Boy Said 'Brainwashed' " in an article which included pictures of the children, later admitted at trial, and a picture of Ernest John, III, with his arm in a sling. Other articles explained "what one phone call may have avoided" and that "court rules Dobbert waifs as dependents." Police were "stymied in grave hunt" and a "fund to aid injured boy–abuse case" was begun by a Jacksonville bank. "Dobbert is sought nationwide" claimed another article on the same day that Mrs. Dobbert made a news media appeal to the Appellant to turn himself in to the police. A front page headline in the local news section informed the public that "Wisconsin to get Dobbert children." The City of Jacksonville was sued for two million dollars by the representatives of the children and this received extensive newspaper publicity, as did the suit when it was dismissed.

In August, another child abuse story began, "a suspected child-abuse and murder case reminiscent of the Dobbert tragedy earlier this year has been uncovered here. . . ." A November headline asked, "What's Police Duty in Child Beatings?" and the newspaper announced in February that "Police Win Dobbert Suit."

On March 9, 1973, a front page banner headline stated "TORTURE SUSPECT DOBBERT ARRESTED." And the next day the newspaper explained that "Police Incredulity Delayed Arrest of Dobbert. . . . But Child-Abuse Charges Finally Reach Houston." A front page banner headline in the Jacksonville Journal claimed, "TWO CHILDREN DEAD – DOBBERT – 'I'M GLAD IT'S OVER' HE SAYS." As the newspapers covered the extradition story, on September 6, 1973, a Times-Union headline stated, "Shorstein Goes to Houston Soon for Dobbert Hearing."

The Appellant's return was thoroughly covered, including newspaper pictures of him leaving a squad car, and bond being raised to $50,000 garnered banner headlines. The unsuccessful police search for the graves led to a newspaper photograph of Detective Munro digging and police comments concerning the clues the Appellant had given them. On December 12, 1973, the newspapers printed that the Appellant was sane and competent to stand trial.

A special report in the Jacksonville Journal on December 10, 1973, explained, "Dobbert could be tried for murder even without bodies."

Throughout the pendency of the case at bar, repeated articles appeared explaining the high amount of child abuse in Jacksonville, Florida in such terms as, "Jacksonville, already famous over the notorious allegations of child torture by Ernest Dobbert, also has a second infamous distinction"; Mrs. Price (of the Family Services Division) speculated the wide publicity given the Dobbert case in Jacksonville "may have led a larger number of people to report suspected abuse cases." No more identification or explanation was needed to identify the case at bar in child abuse articles.

There are two major television stations in Jacksonville, Florida – WJXT-TV and WTLV-TV. WTLV ran sixty-four stories on the case at bar prior to the change of venue hearing (CV 109); WJXT broadcast approximately seventy-seven stories on the case at bar (CV 136). Both stations presented statistics of their broadcast audience during newscasts at the times the stories concerning the case at bar were presented. (Exhibit 10, 12). The 6:00 news on the two stations combined reached between 150,000 and over 200,000 persons, depending on which day the story was broadcast. For example, in November, 1973, the 6:00 news on the two stations combined was watched by almost 300,000 persons.

The news stories from both stations are extensive and can only be understood in their full context by reading each story. However, the stories in which sound film was used are extremely important and indicative of the publicity in the case at bar. WTLV also used chromakey slides when certain news broadcasts were being presented. Two slides used were of Ernest John, III, showing the scars on his back, and the other picture was an unflattering sketch of the Appellant, which was used often.

The news stories on both stations minutely chronicled the case from its inception until the change of venue hearing was held. There are repeated statements from law enforcement officers and comments on statements made by the Appellant, his wife and his children, who were wards of the court and placed in Wisconsin. Some representative stories included:

Film interviews with the Appellant's neighbors and co-workers; extensive film upon the return of the Appellant to Jacksonville in the custody of police officers and the visitation of his wife to him while he was being interrogated in the Duval County Courthouse. The State Attorney in a filmed interview stated that the State would not enter into any plea bargaining in this case and would push for the maximum punishment because children were involved. Both stations extensively covered the search for the bodies, including digging and showing the clues allegedly coming from the Appellant on film on numerous broadcasts. One film explained that under hypnosis, Ernest John Dobbert, III, had told the police where he thought the bodies were buried. The Chief Assistant State Attorney, in a film interview, explained that this would not be an easy case to prosecute without the bodies, but it was "not unheard of and it's not without precedent" to prosecute a murder case without bodies.

There is no question that a motion for change of venue is addressed to the sound discretion of the trial court. *Singer v. State*, 109 So.2d 7 (Fla. 1959). In exercising that discretion, however, the trial court should make every effort to decide the issue based on his feel for the mood of the community and he should be guided by the evidence presented to him by either the defense or the prosecution. *Sheppard, supra*, at 360. In the case sub judice the trial court admitted that he had not reviewed the voluminous evidence introduced at the hearing on Petitioner's motion for change of venue (Tr 25) prior to ruling that an attempt would be made to select a jury (A 27). The court merely noted that actual prejudice had not been shown (CV 1265-66). It would be unfortunate if courts were allowed to apply mechanistic rules when deciding issues which may determine whether an individual lives or dies.

By ignoring the substance of the evidence presented by Petitioner in support of his motion for change of venue, the trial court forced Petitioner to choose from a panel of prospective jurors so thoroughly immersed in the distorted reports appearing in the media that the minds of even the most sincere among them could not be purged. Of eighty-eight jurors examined on voir dire, thirteen indicated that they had no knowledge of the facts of the case. Many of these individuals no doubt felt that they were being completely truthful and yet the majority of them indicated that they read the local papers and listened to or watched at least one radio or television station. In *Irvin v. Dowd, supra*, this Court recognized that where the prospective jurors have been

exposed to "deep and bitter prejudice" shown to be present in the community and when the jurors are exposed to the admitted prejudice of their fellows,[24] little weight can be given to their statements of impartiality.

A second hard choice was forced upon Petitioner by the trial court's decision to attempt jury selection in Jacksonville. In order to preserve a proper record on appeal in Florida it is almost imperative that all peremptory challenges be exercised. *Hawkins v. State*, 206 So.2d 5 (Fla. 1968), *accord, Kelley v. State*, 212 So.2d 27 (2d DCA Fla. 1968) and *Gavin v. State*, 259 So.2d 544 (3d DCA Fla. 1972), *Dobbert, supra.* But the first duty of defense counsel is to attempt to select a jury which be as fair as possible under the circumstances. Petitioner was on trial for his life and a reversal on appeal is never such a certainty that a defendant's substantive right to a fair trial should be subordinated to an arbitrary requirement that all peremptory challenges be exercised. As counsel for Petitioner stated:

> "The defense accepts the jurors tentatively. We would like to say we do it with reservations. The defendant moved for a change of venue. It was taken under advisement and denied pending jury selection. The defendant does not waive this motion. The evidence presented in the change of venue (sic) shows the defendant would not receive a fair trial in Duval County. . . . [I]t would be

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[24] The jury selection in the case sub judice began by taking jurors one at a time. After having interviewed twenty-seven jurors in several days with only five having no knowledge of the case the trial court began calling three jurors at a time. The court began timing the attorneys (Tr 636-44) and repeatedly prompted them to speed up the selection. The court then further accelerated the pace and began to call six jurors at a time. (See Florida Times Union article dated March 21, 1974).

> unfair, and it further prejudiced the defendant's right to a fair trial if we were required to exercise all of our peremptory challenges, since he must choose from a jury panel here in Duval County. Be tried from a jury panel here in Duval County. It must be clear on the record we don't waive our change of venue motion, but we will accept this jury because it is the best jury under the circumstances, but does not meet the constitutional standards for fair trial." (Tr)

At the time Petitioner accepted a panel of jurors there were approximately forty-seven prospective jurors remaining in the courtroom and seventy-five more available on call from the regular circuit court panel not utilized by other courts in session.[25] If Petitioner had peremptorily challenged five of the tentatively selected jurors, thus exhausting his non-cause challenges, the chances of seating five who had the same or a lesser degree of exposure to the "facts" of the case and who would be otherwise acceptable would be small. The State had thirteen remaining peremptory challenges and could have effectively destroyed the panel as tentatively accepted if Petitioner had exhausted those last five challenges. Given the subconscious, psychological impact of the media barrage, only the most open-minded and well-adjusted juror could be expected to provide a clear basis for a challenge for cause:

> (By defense counsel)
>
> "Q. Now, Mr. Alderman, you said that you had heard quite a bit about the case, is that correct, before you came to Court?
>
> (By juror Archie G. Alderman)
>
> A. Yes.
> Q. How did you hear about that?
> A. Radio and TV.

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[25] Jacksonville is a metropolitan city of over 500,000 persons with 21 circuit judges serving a three-county area.

> Q. Did you say you followed it closely?
> A. I didn't follow it deliberately. It was there. Every morning you turn TV on and see what is happening.
> Q. Did you have a fixed opinion when you came in the Courtroom a few days ago as to the guilt or innocence of my client, Mr. Dobbert?
> A. Yes.
> Q. You did?
> A. Yes.
> Q. What was that opinion?
> A. That he was guilty. . . ."

Where the crime charged is itself so inflammatory and emotive, the subtle pressures and opinion-producing elements cannot be objectively measured so as to allow a court or an individual to point to juror number one or juror number twelve and say, "he is the one who did not admit that he could not put aside what he had heard and seen and read." As Justice Boyd said in his dissenting opinion below:

> "The Constitutions of the United States and Florida permit the news media to write extensively about crime and criminals and to discuss the gory details of crime before and during trials. This is a constitutional right that I recognize and respect; however, other constitutional provisions grant persons charged with crime the right to be tried fairly, under due process of law, in an atmosphere of fairness and without prejudice in the minds of the jury. Rarely in the history of Florida has any crime created greater public attention than the activities of the Appellant in the treatment of his children, culminating in two convictions of murder and two convictions of child abuse (sic). It is my opinion that the court should have granted the motion for change of venue in order that the Appellant might be tried in some part of Florida

in which the magnitude of his crimes was not so widely known and so freely discussed among the populace." *Dobbert, supra* at 443, 444.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed and the Petitioner granted a new trial in a venue other than Jacksonville, Duval County, Florida with the maximum possible sentence of life imprisonment with no restriction on eligibility for parole.

Respectfully submitted,

/s/Louis O. Frost, Jr.
LOUIS O. FROST, JR.
Public Defender

WILLIAM P. WHITE, III
Chief Assistant Public Defender

Counsel for Petitioner

Supreme Court, U
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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-5306

ERNEST JOHN DOBBERT, JR.,
Petitioner,

against

STATE OF FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-5306

ERNEST JOHN DOBBERT, JR.,

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STATE OF FLORIDA,

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ON WRIT OF CERTIORARI TO THE
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BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Respondent will adopt the following reference system:

"A" for the Printed Appendix

"R" for the Record on Appeal

"TR" for the Transcript of Trial

"CV" for the Hearing on Change of Venue

"JA" for the Advisory Jury Proceeding.

Appendices to the Petition and Response will be referred to by letter and page. Pretrial proceedings will be referred to by volume and page.

Pursuant to Rule 40, Rules of United States Supreme Court, Respondent will not include in this brief: (1) references to the official report of the court below; (2) a jurisdictional statement; or (3) a reference to statutes or constitutional provisions involved in the case.

QUESTIONS PRESENTED

Whether the imposition of the death penalty as to this petitioner, pursuant to a Florida Statute passed subsequently to the date of the alleged offense for which the petitioner was convicted, was a violation of the constitutional prohibition against ex post facto laws and a denial of equal protection of the laws.

Whether the totality of the circumstances surrounding the petitioner's trial shows inherent prejudice in the pre-trial setting and jury selection process to the extent that the petitioner was denied due process of law.

STATEMENT OF THE CASE AND FACTS

Respondent would augment Petitioner's factual recitation by reference to the facts found by the trial Judge and fully supported by the record including Petitioner's recorded statements. (TR 2247, 2247-2248, 2262-2268):

"'The evidence and testimony showed premeditated and continuous torture, brutality, sadism and unspeakable horrors committed against all of the children over a period of time. The crimes were committed against the children constantly and it is difficult to separate the specific acts against the individual child. What was done to one--short of causing blindness and murder--was done to all. However, the Court has set forth below some of the cruel and brutal acts against Kelly Ann--in so far as trial notes and memory of testimony serve me correctly.

"'Over the period of time of the later portion of Kelly Ann's short, tortuous life the defendant did these things to her on one or many occasions:

1. Beat her in the head until it was swollen.

2. Burned her hands.

3. Poked his fingers in her eyes.

4. Beat her in the abdomen until 'it was swollen like she was pregnant.'

5. Knocked her against a wall and 'when she fell, kicked her in the lower part of the body.'

6. Held her under water in both the bath tub and toilet.

7. Kicked her against a table which cut her head--then defendant sewed up her wound with needle and thread.

8. Scarred her head and body by beating her with a belt and board-- causing marks from her cheek, across the neck and down her back--which injuries worsened without treatment 'until the body juices came out'.

9. On one occasion beat her continuously for 45 minutes.

10. On many occasions kicked her in the stomach with his shoes on, and on the night she died he kicked her a number of times.

11. Kept her out of school so that the many scars, cuts and bruises on her body would not be seen by others.

12. Defendant made no effort to get professional medical care and attention for the child and in fact actively prevented any outsiders from discovering her condition.

13. Choked her on the night she died and when she stopped breathing he placed her body in a plastic garbage bag and buried her in an unmarked and unknown grave.'" (A 47-48)

The trial Judge aptly concluded:

"'I am not easily shocked or affected by tragedy or cruelty--but this murder of a helpless defenseless and innocent child is the most cruel, atrocious, and heinous crime I have every[sic] personally known

> of--and it is deserving of no sentence but death.'"(A 49)

With regard to voir dire, the Florida Supreme Court found:

> "* * * As further evidenced by the record, seventy-eight prospective jurors were interviewed; allowed thirty-two peremptory challenges, the defense only exercised twenty-seven.* * *."(A 64)

SUMMARY OF ARGUMENT

Petitioner has not been subjected to an ex post facto law because the Florida statute relating to capital offenses does not increase the punishment retroactively. The punishment was death or life in prison when Petitioner committed the crime and it remains death or life in prison. To the extent that the new statute precludes parole for twenty-five years on a life sentence, it has been authoritatively construed to be prospective only. The

new statute affects only the procedure by which the death penalty is to be imposed, and thus is not a substantive change. Petitioner had no right to the application of any procedure other than that in effect at the time of his trial.

It is not irrational to apply the procedure in effect at time of trial. Nor does it violate the ex post facto prohibition by altering defendant's situation to his disadvantage, since in fact it gives him three chances at a life sentence where formerly he had only one. It cannot even be said with any degree of assurance that the change in procedure prejudiced Petitioner, because we can only speculate as to what recommendation the jury would have made under the old procedure.

Petitioner has not been denied equal protection. He has not demonstrated that he has been treated differently than any other Florida defendant whose offense was capital when committed and who stood trial after the procedural change in the Florida statute. That Petitioner did not stand trial sooner can only be attributed to his own efforts to avoid the consequences of his heinous conduct.

Petitioner has also failed to demonstrate that prospective jurors in Jacksonville, Florida, were exposed to any publicity with a capacity to prejudice their ultimate decision or that it was impossible to select a fair and impartial jury in his case. Rather, the record demonstrates to the contrary.

THE IMPOSITION OF THE DEATH PENALTY AS TO THIS PETITIONER, PURSUANT TO A FLORIDA STATUTE PASSED SUBSEQUENTLY TO THE DATE OF THE ALLEGED OFFENSE FOR WHICH THE PETITIONER WAS CONVICTED, WAS NOT A VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS AND A DENIAL OF EQUAL PROTECTION OF THE LAWS.

The Ex Post Facto Argument

Petitioner says he is the victim an ex post facto law because he was sentenced under a procedure not in effect when the crime occurred. He cites *Calder v. Bull*, 3 U S 386, 3 Dall 386 (1798).

Respondent concedes the rule of that case that a law is ex post facto if it changes the punishment and inflicts a greater punishment than that provided by law when the crime occurred. But that rule cannot avail Petitioner. His offense was punishable by death when he did it, and death when he stood trial, so that potential punishment was not increased, *Miller v. State,* 332 So.2d 65 at 67 (Fla. 1976).

Petitioner suggests that he was potentially subjected to the possibility of a life sentence without possibility of parole for twenty-five years, even though he did not receive such a life sentence. He is clearly mistaken in this argument, because the new provision to that effect was authoritatively construed in *Lee v. State,* 294 So.2d 305 at 307 (Fla. 1974), to be prospective only. That construction precludes any possible argument that the new procedure is ex post facto because of the provision relating to parole.

Unless changes in procedure affect substantive rights, they may be applied to prior offenses. See *Beazell v. Ohio,* 269 U S 165 (1925), where the change resulted

in joint trial for codefendants, and *Malloy v. South Carolina,* 237 U S 180 (1915), where the method of execution of the death penalty changed. In *Hopt v. Utah,* 110 U S 574 (1884), this Court considered the application of a provision removing the incompetency of convicted felons as witnesses in criminal cases to an offense committed prior to the statutory change. Obviously, the change worked to the disadvantage of Hopt, since it provided an additional prosecution witness. Equally obviously, it could have redounded to the benefit of a defendant by providing previously unavailable defense testimony. In rejecting Hopt's ex post facto argument, this Court said:

> "* * * Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed

> prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime therefore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.
>
> "The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but--leaving untouched the nature of the crime and the amount or degree of proof essential to conviction--only remove existing restrictions upon the competency of certain classes of persons as witnesses, related to modes of procedure only, in which no one can be said to have a vested right, and

> which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged." 110 U S at 589-590

In just the same fashion, a change in who determines punishment may work to the disadvantage of an individual defendant, such as Petitioner, but may also work to the advantage of other defendants, so is not ex post facto. In *James v. Twomey*, 466 F.2d 718 at 721 (7th Cir. 1972), the court rejected the notion that a change from jury to judge in determining punishment would be ex post facto, saying:

> "Petitioner also contends that since the law in Illinois was changed to petitioner's substantial disadvantage after the commission of the offense, it is an *ex post facto* law, prohibited by Article I, Section 10 of the United States Constitution.

> Within the context of this case, it is certainly not clear that the statute as changed, even absent the 'savings clause,' made more onerous the punishment to which a defendant found guilty of rape would be exposed. Under the old code, if defendant were found guilty in a trial by jury, the jury would fix a term of imprisonment which could extend from one year to life. Under the new code the trial judge is given the responsibility of fixing an indefinite term of imprisonment, the minimum term being no less than one year, and the maximum being life. This is certainly distinguishable from the situation encountered in Lindsey v. Washington, 301 U.S. 397 S.Ct. 797, 81 L.Ed. 1182 (1937), in which the newly enacted statute required that what was merely a maximum under the old statute be mandatory term with a possibility of parole.* * *." at 721

See also *Donald v. Jones*, 445 F.2d 601 (5th Cir. 1971), cert.den. 404 U S 992.

In *Marion v. State*, 29 N W 911 at 918-920 (Neb. 1886), the court rejected the argument that a statute making the jury the judge of the facts only could not be

applied to an offense committed at a time when the jury was the judge of both the law and the facts, stating at 919:

> "The phrase, 'the manner of procedure for the enforcement or imposition of all such punishments,' clearly includes the provision of the former statute to which we have referred. The procedure only has been changed. The degree of punishment, the character of the offense, and the rules of evidence, remain as under the former law. It may be observed that the only change in the law is to provide another tribunal to pass upon the law of the case. Prior to the change, if the words in the former Code are to be taken at their full meaning and import, the jury were the judges as to the law of the case on trial. After the change, the courts sits in that capacity, and is the judge of the law. No vested right of plaintiff in error is affected. A new tribunal may be erected, or a new jurisdiction given to try him, and no right is abridged.* * *." at 919

Superficially, *Winston v. State*, 198 S E 667 (Ga. 1938), may appear to be to the contrary, but in fact it is not. The crime was robbery by force or violence, and the former statute prescribed death as the punishment unless the jury should recommend mercy, which reduced the penalty to life in prison. However, the jury also had the option of recommending a sentence of four to twenty years, or that the accused be punished as for a misdemeanor. (198 S E at 669) The new statute provided only the options of death or life in prison. Not surprisingly, the new procedure was held to be ex post facto, since it took away substantial rights, and significantly restricted the range of allowable punishments by eliminating everything below life in prison.

Florida's procedure does not diminish the power of the jury to similarly mitigate the charge against the accused. That power comes through required instructions on

degrees and lesser included offenses, which the Florida Supreme Court has recognized as inherently allowing jury pardons, *Bailey v. State*, 224 So.2d 296 at 297 (Fla. 1969). Petitioner's jury was instructed (TR 2522, 2544-2545) and reinstructed (TR 2562-2568), in this regard, and in fact returned a verdict for one lesser degree of homicide and one lesser offense.(TR 2637-2638)

It cannot be said that Florida's new procedure reduces the possibility of mercy. In fact, it is enhanced. Where only the jury could grant mercy in the past, Petitioner had the possibilities of 1) a jury recommendation which though not binding can only be set aside on facts so clear no reasonable person could differ, *Tedder v. State*, 322 So.2d 908 (Fla. 1975)[1],

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[1] Of the twelve cases reviewed by the

2) mercy from the trial judge[2] and 3) reduction of sentence in the Supreme Court.[3]

Florida Supreme Court, in which a jury recommendation of mercy was overruled, only four have been affirmed. They are reviewed in Justice England's concurring opinion in *Provence v. State,* 337 So.2d 783 at 787 (Fla. 1976). Eight other defendants have received life sentences, including *Chambers* (339 So.2d 204) *Provence, supra, Jones* (332 So.2d 615), *Thompson* (328 So.2d 1), *Tedder, supra, Swan* (322 So.2d 485), *Slater* (316 So.2d 539) and *Taylor* (294 So.2d 648).

[2] It would be difficult to find every case in which the judge imposed a life sentence, or even all cases in which he overruled a jury recommendation of death, since such cases may not be appealed, the appeals do not usually come to the Supreme Court, and the sentence is unlikely to be in issue. Nonetheless, there are at least four established instances in which the death recommendation was overruled, *Rudolph Zadnik* (see Respondent's Appendix A), *Richard Cravero,* Case No. 75-2374 A, Dade County Circuit Court, *Ronald Chandler,* Case No. 75-2374 B, Dade County Court, *Roger Padron,* Case No. 76-1924, Broward County Circuit Court (copies of these judgments and sentences are enclosed for the convenience of the court.)

[3] In *Proffitt v. Florida,* 49 L.Ed.2d 913 at 923 (1976), this Court noted that eight

Overall, the Florida Supreme Court has rendered thirty-three decisions in death cases, and affirmed nineteen. Twenty-one of these thirty-three, and at least four more from *Footnote* 2 received death recommendations. That Petitioner's case did not qualify for mercy was simply due to the heinous nature of what he did, as this Court recognized in *Proffitt v. Florida,* 49 L.Ed.2d 913 (1976), *Footnote* 12 at 925, but

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of twenty-one sentences had been reversed on appeal. Since then six more reversals have followed, including *Lee v. State,* Case No. 47,690, Opinion filed December 9, 1976, *Chambers, Provence* and *Jones* (see *Footnote* 1, *supra*), *Tibbs v. State,* 337 So.2d 788 (Fla. 1976), and *Miller v. State, supra.* Six death sentences have been affirmed, including *Adams v. State,* Case No. 45,450, Opinion filed December 16, 1976, *Funchess v. State,* Case No. 47,828, Opinion filed December 9, 1976, *Meeks v. State,* 339 So.2d 186 (Fla. 1976), *Knight v. State,* 338 So.2d 201 (Fla. 1976), *Meeks v. State,* 336 So.2d 1142 (Fla. 1976), and *Cooper v. State,* 336 So.2d 1133 (Fla. 1976).

the fact that the new procedure favors defendants demonstrates that it is not ex post facto.

Petitioner argues that the jury recommendation to mercy in his case would have produced a life sentence under the old procedure. This is speculation on his part, because his jury would not have had the benefit of the aggravation-mitigation hearing provided by Section 921.141, Florida Statutes, or the instructions of the Court. Petitioner's counsel would surely not have been allowed to read Nizer's account of the execution of the Rosenbergs in a single stage trial. Yet that was virtually the only matter presented in mitigation.(JA 47, 49-62) It cannot be said with certainty what his jury would have recommended under the old procedure, but it is clear that the old procedure could not have been applied to

Petitioner without any change because it did not pass constitutional muster under *Furman v. Georgia,* 408 U S 238 (1972). The majority opinions in *Furman* are replete with references to the unconstitutionality of death sentences imposed under statutory arrangements providing unbridled discretion to judge or jury. Surely Petitioner does not contend he had the right to be sentenced under an unconstitutional procedure.

Petitioner seems to contend that capital punishment was completely abolished by *Furman, supra,* and the resulting Florida decisions. It is far from clear that any such contention is properly preserved for this Court's consideration.[4] Further,

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[4] Petitioner's pretrial motions simply alleged great confusion in the law.(A 7,8-9) When counsel stated objections to the capital trial, before jury selection (TR 25), and again before the advisory verdict proceeding

Petitioner reads more into *Furman* and its progeny than exists.

True it is that this Court's pronouncement in *Furman, supra,* generated some confusion, but careful reading of resulting Florida decisions establishes a fairly clear pattern. *Furman* plainly invalidated all existing death sentences, which produced *Anderson v. State,* 267 So.2d 8 (Fla. 1972) and *In re Baker,* 267 So.2d 331 (Fla. 1972). Faced with the problem of the status of the death penalty between the effective date of

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(JA 20), he hardly made the basis for his objection clear. Even the Petition for Writ of Certiorari filed in this Court does not contain this argument, but relies instead on the fact that a jury recommendation to mercy would have been binding when the crime occurred, and the alleged denial of equal protection. Under decisions such as *Cardinale v. Louisiana,* 394 U S 437 at 439 (1969), it would appear to be a bit late for Petitioner to raise new arguments.

Furman and the effective date of Florida's new statute, the court held that capital punishment was abolished in the interim, *Donaldson v. Sack,* 265 So.2d 499 (Fla. 1972). That is why the *Prince* alluded to in Petitioner's *Footnote* 15 was not subjected to the possibility of capital punishment. His crime occurred during the interim period. In like manner, the Akins of *Akins v. State,* 202 S E 2d 62 (Ga. 1973), committed his crime during Georgia's interim period.

On the first occasion the court had to consider the status of offenses committed before *Furman,* the court made it clear that capital crimes had not been completely obliterated. In *State ex rel. Manucy v. Wadsworth,* 293 So.2d 345 (Fla. 1974), the court not only held that the statute of limitations for capital crimes remained in effect, but also held that Manucy had to be indicted for his capital offense.

Florida's First District Court of Appeal had already concluded that capital punishment remained viable in *State v. Lee*, 286 So.2d 596 (Fla. 1 DCA 1973), and it should be no surprise that the Supreme Court agreed, *Lee v. State*, 294 So.2d 305 (Fla. 1974). That Petitioner's continued reliance on *Donaldson, supra,* is misplaced is evident from *Lowe v. Stack*, 326 So.2d 1 (Fla. 1974), which again limits application of *Donaldson* to the interim period.

It is respectfully submitted that the First District correctly assessed the effect of *Furman*, to wit:

> "'[T]he imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.'" 286 So.2d at 597-598

It would have been a futile gesture to try to save the existing Florida procedure when a new procedure had already been enacted by the legislature, but it could and undoubtedly would have been done had the legislature taken no action. For example, the Circuit Judges could have collectively established and utilized guidelines for the jury's guidance, or the Florida Supreme Court could have achieved the same result through their Standard Jury Instructions or Rules of Procedure. Appellate review of death sentences could have been provided by the simple expedient of receding from the court-established rule that sentences within statutory limits are not reviewable. See e.g., *Stanford v. State*, 110 So.2d 1 at 2 (Fla. 1959). It is simply inaccurate to say that the demise of capital punishment, or even Florida's old statute, was compelled by *Furman* or its progeny.

Wisconsin's amicus brief suggests that the jury is the conscience of the community, so should have a greater voice in the ultimate decision on life or death. Petitioner's advisory verdict notwithstanding, it hardly appears that his jury deemed his case appropriate for "mercy". Petitioner has graciously provided this Court with evidence that his jurors considered a life sentence harsher than death for him, so that he would have to live with the knowledge of what he had done to his own children. One juror is quoted as saying "I've heard what they do to child molesters in prison and I think a life of that treatment is worse than death."(Petitioner's Appendix C 34c)

In view of the weight given to Florida's advisory verdicts, it cannot be said that Florida does not recognize the role of the jury as the conscience of the community. Undoubtedly, Florida could have made the jury recommendation binding, as did Georgia (approved in *Gregg v. Georgia,* 49 L.Ed.2d 859 (1976). The simple fact is that

Petitioner was processed under a procedure upheld by this Court in *Proffitt*. It is the procedure which was in effect when he stood trial. It is respectfully submitted that Petitioner was entitled to no more. In *Gibson v. Mississippi*, 152 U S 565 at 590 (1896), this Court said:

> "* * * The inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The mode of trial is always under legislative control, subject only to the condition that the legislature may not, under the guise of establishing modes or procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments.* * *." at 591

To summarize, Petitioner's theory that his sentencing procedure was an ex post facto application is without merit. Only the procedure changed, not the punishment imposable. Accordingly, despite all of

Petitioner's speculations about what might have happened under other procedure, there was no ex post facto violation.

The Equal Protection Argument

For purposes of his equal protection argument, Petitioner would like to divide all of Florida's capital cases into those committed before *Furman*, and those committed after Florida's new procedure became effective. Even that division may not avail him, because many persons who committed capital crimes before *Furman* were executed. Respondent would submit the correct division is between those already sentenced when *Furman* invalidated existing death penalties, and those subsequently tried for capital offenses.

Petitioner argues that it is irrational to decide his legal status based on his

date of trial, but if so, then how does he explain *Johnson v. New Jersey*, 384 U S 719 (1966), which applied the dictates of *Miranda* only to those defendants coming to trial after the date of the decision?

Viewing the operation of any statute for a limited period of time may create the impression that it affects so few people as to deny equal protection, but that is not automatically so. Respondent will simply note that Petitioner is not the only pre-Furman offender still subject to the possibility of the death penalty. The Miller of *Miller v. State, supra,* is again before the Florida Supreme Court in Case No. 50,606, and others are still working their way through the Florida Courts, including the Dalton of *Baker and Dalton v. State,* 202 So.2d 563 (Fla. 1967), who has not yet been retried. There are undoubtedly others in other jurisdictions.

Petitioner's reliance on *Lee v. State*, Case No. 47,690, Opinion of Supreme Court filed December 9, 1976, is plainly misplaced. Lee had in fact been sentenced to death before *Furman*. It was a denial of equal protection to subject him to the death penalty since all others with pending death sentences were resentenced to life. Petitioner simply was not in that class.

True it may be that persons fully deserving the death sentence have escaped their just rewards as a result of having already been sentenced, but this Court recognized in *Proffitt v. Florida, supra*, 49 L.Ed.2d at 924 and *Footnote* 16 at 927 that this was not grounds to invalidate capital punishment. And Petitioner should not be heard to complain that he was not tried sooner. He can only blame himself for that, having hidden his gruesome acts

by lying to investigators, fabricating a suicide in Fort Lauderdale, and fleeing to parts unknown, moving on every time he was in danger of discovery.

It is absurd for Petitioner to discuss what might have happened to his wife had she been prosecuted sooner. She was not prosecuted and could not have been, since her alibi was ironclad. She was in jail while Petitioner killed their children.

Petitioner also relies on Article X, Section 9, of the Florida Constitution, which has been held to "save" the application of criminal statutes subsequently repealed or amended. But the new statute does not effect a substantive change in the offense or the punishment, and the provision does not apply to procedural changes. *Lee v. State*, 129 Fla. 319, 174 So. 589 (1937), *Mathis v. State*, 31 Fla. 291, 12 So. 681 (1893).

THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE PETITIONER'S TRIAL DOES NOT SHOW INHERENT PREJUDICE IN THE PRETRIAL SETTING AND JURY SELECTION PROCESS TO THE EXTENT THAT THE PETITIONER WAS DENIED DUE PROCESS OF LAW.

Respondent relies on this Court's recent decision in *Murphy v. Florida*, 421 U S 794 (1975), where this Court stated:

> "The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent" jurors.' Irvin v. Dowd, 366 US, at 722, 6 L.Ed.2d 751, 81 S Ct 1639. Qualified jurors need not, however, be totally ignorant of the facts and issues involved.
>
> > 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' *Id.*, at 723, 6 L.Ed.2d 751, 81 S Ct 1639." at 799-800

The publicity on *Murphy* contained highly prejudicial material about unrelated offenses and convictions. Petitioner has not and cannot show what his publicity contained with a capacity to prejudice him which approaches that on *Murphy*.

At the hearing on Petitioner's motion for change of venue, the assistant state attorney simply sought to determine whether any of Petitioner's witnesses were aware of any matter given publicity which was not likely to come out at trial. None of the witnesses knew of any such material.(CV 19-21, 29-31, 34-35, 44, 49-50, 56-57, 66-67, 76, 90-92, 130-131, 156-157)

Had the prospective jurors read and heard every media account, and retained total recall, what would they know that did not come from the witness stand? The jury heard from Petitioner's surviving son, who was featured in some stories, and from his neighbors. They heard that Petitioner had faked suicide and fled to Texas, where he was arrested.(TR 2060-2070) They heard that he had been questioned, given statements and even offered to help locate the bodies if given immunity.(TR 2337-2342, 2346-2359) They learned of the clues he provided as to the location of the bodies. (TR 2143) They learned of efforts by law enforcement officers to find the bodies. They learned that a capital case could be prosecuted even without a body, not only in voir dire and closing arguments, but also from the court's instructions.(TR 2534-2535) It cannot have come as a surprise to the jurors that the State worked very hard on the case and was seeking the ultimate penalty. It is respectfully submitted that the publicity, standing

alone, did not require a change of venue.

It must also be remembered that Murphy's trial judge did nothing to insulate prospective jurors from news coverage, or to limit discussion among prospective jurors. (See 421 U S at 803-804) Petitioner's trial judge entered an order March 12, 1974, prohibiting attorneys, witnesses and court personnel from releasing further statements about the case.(Petition 9) He instructed prospective jurors not to discuss the case. (TR 5-6) Trial jurors were instructed repeatedly not to discuss the case and to avoid media accounts.(See e.g., R 86) When the trial began, the jury was sequestered.(TR 1404-1406)

Petitioner had thirty-two peremptory challenges available. When the jury was accepted he had five remaining. This alone demonstrates that he did not encounter that degree of hostility which would make it impossible to select a fair jury. The voir dire bears this out. (See Respondent's Appendix E, which Petitioner apparently accepts as accurate.) Of the eighty-eight prospective jurors examined (including selection of alternate jurors), fifteen had never heard of Petitioner or his case. Twenty-two more had heard of him, but had formed no opinion. Twelve had heard enough to form an opinion which they thought could be set aside. Only twenty-four, less than one-third, expressed any great difficulty in setting aside the opinion that had formed from what they heard.

By Respondent's count, of the eighty-eight prospective jurors, the defense excused twenty-seven, and the State excused nineteen. Of the twenty-five excused for cause, four were for hardship reasons and two were excused under *Witherspoon v. Illinois*, 391 U S 510 (1968), for fixed

views on the death penalty. Thus, only nineteen were excused for prejudice against Petitioner, one based not on the media, but on personal knowledge, and some if not all based in part on the prejudice inherent in the charges, prejudice which could not have been avoided wherever the case was tried.

Comparing *Murphy* again, all seventy-eight of his prospective jurors had heard of him. Twenty were excused for cause for having prejudged him. (421 U S at 769) Just as some of *Murphy's* prospective jurors thought him innocent based on what they had heard, some of Petitioner's prospective jurors thought him innocent because the bodies were not found.

In all aspects, Petitioner's case falls short of the showing made in *Murphy*. If a change of venue was not required for "Murph the Surf", it certainly was not mandatory for Petitioner. To confirm this conclusion, it is only necessary to review the deliberations of Petitioner's jury. They deliberated for over seven hours. (TR 2562, 2636) They requested reinstruction on lesser offenses and degrees. (TR 2562) They reheard the testimony of Petitioner's son (TR 2610), and two other witnesses (TR 2575). Their verdicts included two of guilty as charged and two for lesser degrees or offenses. Petitioner simply has not demonstrated that he was denied a fair and impartial jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Florida Supreme Court, upholding Petitioner's judgment and sentence, should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-5306

ERNEST JOHN DOBBERT, JR.,
Petitioner

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Florida

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

INTEREST OF N.L.A.D.A. AS AMICUS CURIAE

(1) The National Legal Aid and Defender Association (N.L.A.D.A.) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems, and legal aid societies in the United States. The Association also includes four thousand

individual members, most of whom are private practioners.

(2) Members in N.L.A.D.A. include both public defenders and private practioners in every state in which the death penalty might be imposed. Many persons represented by members of the Association face this possible penalty and, indeed, have been sentenced to die. The N.L.A.D.A. has a vital interest in assuring that persons sentenced to death following this Court's mandates of July 2, 1976, are guaranteed scrupulous protection of their constitutional rights prior to the execution of such ultimate judgment.

(3) The issues involved in this case concern not only the possible imposition of the death penalty, but also the *ex post facto* application of other types of sentencing alternatives of interest to N.L.A.D.A. members.

(4) N.L.A.D.A. has received the consent of both parties for the filing of this brief.

SUMMARY OF ARGUMENT

1.

The issue before the Court in this petition is whether the change in Florida law between the date of the offense and the date of petitioner's sentencing denied the petitioner such substantial rights as to amount to an *ex post facto* law. It is the position of the National Legal Aid and Defender Association that the statutory modification was such a substantive change

because the result under the previous law was that the petitioner could not have been executed, while he was actually sentenced to die under the law in effect at the time of the sentencing. Moreover, the petitioner would have a number of additional rights in having the jury determine his sentence rather than the trial court. These rights include having persons who might be generally opposed to the death penalty on the jury, freedom from political or other extraneous pressures, and the ability to argue more broadly than allowed under current law.

2.

The imposition of the death penalty upon this petitioner would constitute a denial of equal protection of law because the petitioner has been placed in a class in which his life or death depends on the date of his trial. This is an irrational basis for the imposition of the death penalty and is contrary to the intention of this Court to end the "freakish" imposition of the death penalty.

ARGUMENT

I. Any Statutory Modification Which Results In A Death Sentence Being Imposed, Which Would Have Not Been Possible Under The Law In Effect At The Time Of The Act, Is *Per Se* The Application Of An *Ex Post Facto* Statute.

A. The narrow issue is whether the change in procedure for imposing the death penalty is "procedural" or "substantive."

In order to understand the issue raised in this case, several basic concepts must be restated. First, a statute which increases the penalty for an act beyond that which was provided at the time of the act is an *ex post facto* law, *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 325-326 (1867); *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 377-378 (1867); and *Fletcher v. Peck,* 10 U.S. (6 Cranch.) 87, 137 (1810). Thus, it is clear that had the petitioner (hereinafter defendant) committed a crime for which the death penalty was not possible at the time of the act, the subsequent adoption of such a penalty for the offense would not and could not, constitutionally, apply to the petitioner, *White v. Brown,* 468 F. 2d 301, 303 (9th Cir. 1972). It is also clear, as will be developed below, that some changes in the criminal law, not changing the possible sentence, so alter the defendant's situation as to constitute an *ex post facto* law.

On the other hand, a second usual rule is that changes in criminal *procedure* after the date of the criminal act are not treated as *ex post facto, Frisby v. United States,* 38 App. D.C. 22, 25 (1912); *Beazell v. Ohio,* 269 U.S. 167, 171 (1925).

In the instant matter, the defendant was sentenced pursuant to a statute which was not in effect at the time of the act. Under the statute which was effective on the date of the crime, the defendant could not have been sentenced to death because of the jury's recommendation of mercy. Under the statute in effect at the time of sentencing the defendant could be, and was, sentenced to die by the court, notwithstanding the jury's recommendation of mercy. For the reasons which follow, it is the position of the National Legal Aid and Defender Association that such a change in statutory scheme for the imposition of the death penalty was a substantive change, manifestly effecting the rights of this defendant, and as such must be treated as an *ex post facto* law prohibited by Article I, section 10, of the United States Constitution.

B. The change in statutory scheme deprived the defendant of substantial rights and as such is an ex post facto law.

If the change in statutory scheme for the imposition of death in Florida is found to be substantive, rather than procedural, the sentence imposed in this case is unconstitutional as being *ex post facto.* The answer to the question of whether the statutory change is substantive or procedural depends upon its effect upon the defendant. This Court made that clear as long ago as *Kring v. Missouri,* 107 U.S. 221, 228-229 (1882), in stating that a statute is *ex post facto* when it "alters the situation of a party to his disadvantage ...[or] ... takes away or impairs the defense." In *Kring,* this Court invalidated a state constitutional provision which had been interpreted to abrogate the law existing at the time of the offense, that made conviciton of the lesser-included offense of second degree murder an acquittal of first degree murder when the defendant was tried on an indictment charging the greater offense.

In *United States v. Henson,* 486 F. 2d 1292, 1304-1308 (D.C. Cir. 1973), the Court of Appeals examined these same questions most carefully and decided, *en banc,* that a statutory amendment that mandated the admission into evidence of the defendant's prior criminal record should he testify, when the law at the time of the act granted the court discretion to admit or reject such evidence, was an *ex post facto* law. The appellate court found that had the court exercised its discretion to exclude such testimony from evidence, the new statute would have prejudiced the defendant in two ways. First, because the admission of the prior record diminished his credibility, and, secondly, because such statutory change may have deterred the defendant from testifying on his own behalf.

1. The difference in penalty possible under the old and present law is sufficient in itself to meet the test for an *ex post facto* statute.

One can hardly imagine a statutory change which more significantly changes the defendant's situation than that which would have allowed him to live under the old law, but provides that he be put to death under the modified law. In *Kring,* the Court indicated that a statute that takes away "any substantial right" from the defendant is *ex post facto,* at 107 U.S. 228-229. Can it be argued that a statute which deprives the defendant of his life has not deprived him of a substantial right? Obviously not.

Under all of the cases decided by this Court, a statute is *ex post facto* if it deprives a defendant of a substantial right. It is the fundamental position of the National Legal Aid and Defender Association that any statutory modification which results in a person being sentenced to death, when such a penalty would not have been possible under prior law, is *per se ex post facto* under the "substantial right" test adopted by this Court, whether the change was in the substantive law, sentencing provisions, evidentiary rules, or rules of procedure./[1] Such changes are substantive in relation to the *ex post facto* question.

2. The defendant has substantially more rights when the jury makes a binding determination that the death penalty not be imposed than when the trial court can sentence to death notwithstanding the jury's recommendation of mercy.

Even if the Court is unwilling to adopt the foregoing reasoning, it is submitted that the defendant was denied a substantial right by having the judge or court make a discretionary determination rather than

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/[1] This position is consistent with the rule followed by this Court in determining whether to follow the federal procedural rules or the state's substantive rules in diversity actions brought in federal court. This Court has found a state's statute of limitations to be substantive law, *Holmberg v. Armbrecht,* 327 U.S. 392 (1946), *Guaranty Trust v. York,* 326 U.S. 99 (1945); a state's *res judicata* principles to be substantive, *Angel v. Bullington,* 330 U.S. 183 (1947); a state's rules regarding the exclusion of non-qualified corporations from litigation to be substantive, and not procedural provisions, *Woods v. Interstate Realty Co.,* 337 U.S. 535 (1949); as well as a state burden of proof, *Cities Service Oil Co. v. Dunlap,* 308 U.S. 208 (1939); contributory negligence, *Palmer v. Hoffman,* 318 U.S. 109 (1943); conflict of laws, *Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U.S. 487 (1941); and accrual of the cause of action, *West v. American Tel. & Tel. Co.,* 311 U.S. 223 (1940).

These cases all underline the proposition that it is the rights created by the rule, not its title or nature which governs whether it is considered substantive or procedural.

have the recommendation of the majority of jurors binding upon the sentencing court.

A jury in a death case expresses the "conscience of the community on the ultimate question of life or death," ***Witherspoon v. State of Illinois,*** 391 U.S. 510, 519 (1968). Indeed, for that very reason, in ***Witherspoon*** this Court ruled that persons with general religious or conscientious scruples against the imposition of the death penalty could not be excluded from a jury in a capital case. It is entirely possible that a jury, representing a cross section of the community, would recommend mercy, while the individual judge would sentence the defendant to death. Indeed, that very thing happened here. In ***Witherspoon,*** and its progeny,/[2] this Court has made apparent the importance of the jury determination. It is difficult to believe that the substitution of a discretionary determination by a single judge for a decision made by the majority of a jury, representing the cross section of the community, including those persons with general conscientious objections to the death penalty, would not be a substantial loss to a criminal defendant. The change is not only a change in procedure, it is a substantive change as well./[3]

/[2] ***Boulden v. Holman,*** 394 U.S. 478 (1969); ***Maxwell v. Bishop,*** 398 U.S. 262 (1970); ***Wigglesworth v. Ohio,*** 403 U.S. 947 (1971); ***Davis v. Georgia,*** — U.S. — (20 Cr.L. 4092, 12/3/76).

/[3] In ***Woodson v. North Carolina,*** — U.S. —, 96 Sup. Ct. 2978, 2987 fn. 31 (1976) (plurality opinion per J. Stewart), it was pointed out that a jury imposes death in less than 20% of the cases.

Indeed, the Georgia Supreme Court determined that a statute which changed the law from jury to judicial sentencing was *ex post facto, Camp v. State,* 187 Ga. 76, 200 S.E. 126 (1938), and *Hunt v. State,* 187 Ga. 73, 199 S.E. 801 (1938). Similarly, the United States Court of Appeals for the Fifth Circuit upheld as procedural a change which pertained only to the *time* a defendant makes his decision to elect jury, as opposed to judicial, sentencing, *Donald v. Jones,* 445 F. 2d 601 (5th Cir. 1971), while the Court of Appeals for the Seventh Circuit held that a statute changing jury sentencing to judicial sentencing was not *ex post facto* because of a "savings clause" which allowed only those sections of the new statute which mitigated punishment to apply to acts committed before the effective date of the change, *James v. Twomey,* 466 F. 2d 718, 721 (7th Cir. 1972). All of these cases support the proposition that a change from jury to judicial sentencing is substantive and *ex post facto* on the facts of the present case.

It would also be to ignore the obvious not to recognize the fact that many times elected trial court judges are placed under considerable pressure from the electorate, media, and community in general to impose the death penalty whether those feelings are representative of the true community or not. A judge who has to run on his record in a community in which crime is a serious problem would certainly be more inclined to impose death than a jury of citizens who are able to grant the defendant the individualized justice this Court's decision in *Woodson v. North Carolina, supra,* demands.

In the various death penalty cases decided by this Court, it appears that a primary concern has been the freakish or arbitrary application and imposition of capital punishment by both judges and juries. The statutes upheld by this Court subsequent to *Furman v. Georgia,* 408 U.S. 238 (1972), have overcome these problems by providing criteria, standards, and careful judicial review. While no one would differ with the proposition that a judge or jury should be carefully guided by articulated criteria and standards when considering the imposition of the death penalty, the fact is that in a given case the lack of standards under earlier statutes might well benefit a defendant. Thus, while the statute in effect on the date of the murder may well have been unconstitutional, that does not mean that the defendant might not have had rights and privileges under that statute that were restricted under the newer, valid, statute. While the defendant may have no constitutional right to a binding jury verdict on sentencing, the fact is that in a given situation, and specifically in the instant matter, the statutory right to a binding jury verdict of mercy creates important and substantial rights which accrue to the benefit of this defendant. For this reason, the National Legal Aid and Defender Association submits that the statutory modification of the method for imposing the death penalty in Florida removed a substantial right from this defendant and for that reason his sentencing to death under a statute enacted subsequent to the offense was unconstitutional as being an *ex post facto* law.

II. The Imposition Of The Death Penalty In The Instant Case Is A Denial Of Equal Protection Of Law.

There is little that can be added to petitioner's argument in relation to the assertion that the imposition of death upon Dobbert amounts to a denial of equal protection of law. Indeed, the Florida Supreme Court acknowledged as much when, in *In re Baker,* 267 So.2d 331 (1972), it ruled that all pre-*Furman* defendants sentenced to death would be immediately resentenced to life imprisonment with the possibility of parole to avoid resentencing under a new statute which required a no-parole life term./[4] Most recently, in *Rudolph Valentine Lee v. State of Florida,* — So.2d — (1976) (case no. 47,690, decided December 9, 1976), the Court found that the defendant was sentenced to death only because his attorney had filed a motion to reduce sentence, which was granted thereby allowing the state to appeal, and resulting in the imposition of death after the reversal on appeal. Had the defendant done nothing, his sentence would have automatically been reduced to life imprisonment. The Court found this to be an unfair result saying that "... the question of whether a person should live or

be put to death by the State should [not] be determined by the legal procedures of when his request for reduction of sentence was made" (slip opinion, page 3).

Yet, this defendant is being placed in a class by himself, or in which there are very few others. Had this defendant been tried and convicted earlier, he could not have been sentenced to death. The National Legal Aid and Defender Association submits that the question of whether a person should live or be put to death should not be determined by the date of trial any more than by the date some procedural motion is filed.

In the July 2, 1976 decisions of this Court on the death penalty, the single thread running through all of the decisions is that the imposition of this penalty should not be arbitrary or capricious. Justice Stewart, concurring in *Furman,* called the imposition of death under pre-*Furman* statutes "wanton and freakish," at 408 U.S. 309-310. "Freakish" is indeed the appropriate word to describe the imposition of the death penalty upon Ernest John Dobbert.

Dobbert is perhaps the only person who could not have been executed under the previous law who has now been sentenced to death notwithstanding the fact that the crime took place before the effective date of the statute. Considering what the defendant has at stake in these proceedings, one could hardly argue that the situation in which the defendant finds himself does not deny him a substantial right, *cf. Braley v. Gladden,* 403 F. 2d 858, 861 (9th Cir. 1968); *James v. Twomey, supra,* at 466 F.2d 721.

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[4] The Florida court said: "There appears to be no reason why the remaining members of the class need be treated differently [than those whose sentences had already been modified]. To do so would create a class statutorily denied parole, while facing life terms in prison. The uniqueness of this position would foster litigation attacking both the facial validity of the statute ... and its selective application to an indistinguishable few — a seeming denial of equal protection," at 334-335.

It is simply not rational to have the ultimate life or death of this defendant hinge on the date of his trial. Allowing the defendant to be put to death under these circumstances when ten members of the jury and one member of the Florida Supreme Court believed that the facts do not warrant such a punishment would be inconsistent with the great solicitude the members of this Court have expressed for avoiding the arbitrary, capricious, and "freakish" imposition of the death penalty.

CONCLUSION

For the reasons set forth herein, it is the position of the National Legal Aid and Defender Association that the imposition of the death penalty upon Ernest John Dobbert was unconstitutional as being *ex post facto* as well as a denial of equal protection of law. Thus, the N.L.A.D.A. joins the petitioner in urging this Court to reverse the judgment of the Florida Supreme Court and to remand this matter with directions to reduce the sentence imposed herein from death to life.

Respectfully submitted,

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